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THE

WORKS

OF

FRANCIS BACON.

VOL. VII.

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THE

WORKS

OF

FRANCIS BACON

BARON OF VERULAM, VISCOUNT ST. ALBAN,

AND

LORD HIGH CHANCELLOR OF ENGLAND.

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VOL. VII.

LITERARY AND PROFESSIONAL WORKS, VOL. II.

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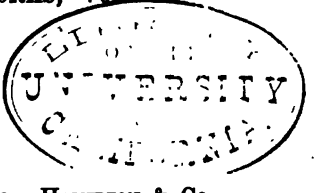

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1879.

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VOL. VII.

been inserted on revision, — I am inclined to think that Eupolis, the "Politique," would have limited his approval to a war against the *Turks;* and that not simply as Infidels, but as dangerous neighbours to all Christendom. And I suppose that as things then stood the Christian powers might very fairly, and merely in self-defence and as a matter of international policy, have demanded securities from the Turks, the refusal of which would (even according to modern opinions) have formed a just ground of war. That it would have been a "holy war,"—that is, that it would incidentally have had the effect of recovering to the Church countries then subject to Infidels, — would in Bacon's eyes no doubt have been a great additional recommendation: experience not having yet sufficiently proved that subjection of territory to Christian rule does not involve conversion of people to the Christian faith.

Setting aside the practical question as to the lawfulness of wars for the propagation of the faith — a question which would now in any company of divines and statesmen be negatived without a division,— and regarding the work as a literary composition, it will be found not merely to be still interesting, but to deserve a conspicuous place among Bacon's writings. For it is the only specimen we have of his manner of conducting a discussion in the form of dialogue; and enough is done to show how skilfully he could handle that fine but difficult instrument. The design of the composition is to represent the question as fairly debated between several speakers looking at it from different points of view, and each bringing the full force of his wit and learning to the support of his own conclusion; and nothing can be more natural and life-like than the conversation, so far as it goes. The historical matters incidentally handled have an interest also which is by no means obsolete. And the dedicatory letter to Bishop Andrews contains the fullest account of Bacon's own personal feelings and designs as a writer which we have from his own pen.

This fragment was first published by Dr. Rawley in 1629, along with two or three others, in a small volume entitled *Certain miscellany works of the Right Honourable Francis Lo. Verulam, Viscount St. Alban:* the alleged motive of the publication being to supersede or prevent corrupt copies, and "to satisfy the desires of some who held it unreasonable that any delineations of that pen, though in never so small a model,

should not be shown to the world." It was afterwards by Bacon's own direction (as I have said), and apparently under his supervision, translated into Latin, and added to the *Opera Moralia et Civilia*. There is a manuscript copy of part of it in the British Museum[1], and another in the Cambridge University Library; but Rawley's edition contains some passages which are not in the MS. and therefore I suppose it was printed from a corrected copy and is the better authority.

As in other similar cases I have compared the English with the Latin, and quoted in foot-notes all variations which seem to be at all material.

[1] Harl. MSS. 4263.

ADVERTISEMENT TOUCHING AN

HOLY WARRE.

WRITTEN IN THE YEARE 1622.

WHEREUNTO THE AUTHOR PREFIXED AN EPISTLE TO THE BISHOP OF WINCHESTER LAST DECEASED.

LONDON.
Printed by John Haviland for Humphrey Robinson.
1629.

TO

THE RIGHT REVEREND FATHER IN GOD,

LANCELOT ANDREWS,

LORD BISHOP OF WINCHESTER, AND COUNSELLOR OF ESTATE TO HIS MAJESTY.

MY LORD,

AMONGST consolations, it is not the least, to represent to a man's self like examples of calamity in others. For examples give a quicker impression[1] than arguments; and besides, they certify us, that which the Scripture also tendereth for satisfaction, *that no new thing is happened unto us.* This they do the better[2], by how much the examples are liker in circumstances to our own case; and more especially if they fall upon persons[3] that are greater and worthier than ourselves. For as it savoureth of vanity, to match ourselves highly in our own conceit[4]; so on the other side it is a good sound conclusion, that if our betters have sustained the like events, we have the less cause to be grieved.[5]

In this kind of consolation I have not been wanting to myself; though as a Christian I have tasted (through God's great goodness) of higher remedies. Having therefore, through the variety of my reading, set before me many examples both of ancient and later times, my thoughts (I confess) have chiefly stayed upon three particulars, as the most eminent and the most resembling.[6] All three, persons that had held chief place of

[1] *penetrant magis.* [2] *afficiunt autem exempla eo magis, quo, &c.*
[3] *si Fortuna illos non levius mulctarit, qui, &c.*
[4] *si nos ipsos cum melioribus componamus.*
[5] *non esse cur nos supra modum conqueramur.*
[6] *Cogitationes meæ moram (fateor) fecerunt, imo etiam acquieverunt, in tribus præcipue viris; tanquam maxime eminentibus, et cum illâ fortunâ quæ mea aliquando fuit conjunctissimis.*

authority in their countries; all three ruined, not by war, or by any other disaster, but by justice and sentence, as delinquents and criminals; all three famous writers, insomuch as the remembrance of their calamity is now as to posterity but as a little picture of night-work, remaining amongst the fair and excellent tables of their acts and works[1]; and all three (if that were any thing to the matter) fit examples to quench any man's ambition of rising again; for that they were every one of them restored with great glory, but to their further ruin and destruction, ending in a violent death. The men were, Demosthenes, Cicero, and Seneca; persons that I durst not claim affinity with, except the similitude of our fortunes had contracted it. When I had cast mine eyes upon these examples, I was carried on further to observe[2] how they did bear their fortunes, and principally how they did employ their times, being banished and disabled for public business: to the end that I might learn by them; and that they might be as well my counsellors as my comforters. Whereupon I happened to note, how diversely their fortunes wrought upon them; especially in that point at which I did most aim, which was the employing of their times and pens. In Cicero, I saw that during his banishment (which was almost two years) he was so softened and dejected, as he wrote nothing but a few womanish epistles.[3] And yet, in mine opinion, he had least reason of the three to be discouraged: for that although it was judged, and judged by the highest kind of judgment, in form of a statute or law, that he should be banished, and his whole estate confiscated and seized, and his houses pulled down, and that it should be highly penal for any man to propound his repeal; yet his case even then had no great blot of ignominy; but it was thought but a tempest of popularity[4] which overthrew him. Demosthenes contrariwise, though his case was foul[5], being condemned for bribery; and not simple bribery, but bribery in the nature of treason and disloyalty; yet nevertheless took so little knowledge of his fortune, as during his banishment he did much busy himself and intermeddle with matters of state; and took upon him to

[1] The rest of this sentence is not in the Cambridge MS.

[2] *Fuerunt hi tres viri, Demosthenes, Cicero, et Seneca. Quando igitur cum viris hisce eximiis me tum fortuna tum studia conjunxerint, inquirere et observare cœpi, &c.*

[3] *epistolas quasdam muliebres . . . omnia querelis implentes.*

[4] *temporis procella.*

[5] *licet judicium quo proscriberetur ignominiæ plenum esset.*

counsel the State (as if he had been still at the helm) by letters; as appears by some epistles of his which are extant. Seneca indeed, who was condemned for many corruptions and crimes, and banished into a solitary island, kept a mean; and though his pen did not freeze, yet he abstained from intruding into matters of business; but spent his time in writing books, of excellent argument and use for all ages; though he might have made better choice (sometimes) of his dedications.[1]

These examples confirmed me much in a resolution (whereunto I was otherwise inclined) to spend my time[2] wholly in writing; and to put forth that poor talent, or half talent, or what it is, that God hath given me, not as heretofore to particular exchanges, but to banks or mounts of perpetuity, which will not break.[3] Therefore having not long since[4] set forth a part of my Instauration; which is the work, that in mine own judgment (*si nunquam fallit imago*) I do most esteem; I think to proceed in some new parts thereof.[5] And although I have received from many parts beyond the seas, testimonies touching that work, such as beyond which I could not expect[6] at the first in so abtruse an argument; yet nevertheless I have just cause to doubt, that it flies too high over men's heads[7]: I have a purpose therefore (though I break the order of time) to draw it down to the sense, by some patterns of a Natural Story and Inquisition.[8] And again, for that my book of Advancement of Learning may be some preparative, or key, for the better opening of the Instauration; because it exhibits a mixture of new conceits and old; whereas the Instauration gives the new unmixed, otherwise than with some little aspersion of the old for taste's sake; I have thought good to procure

[1] *licet aliquos eorum dedicaverit, minus pro dignitate.*

[2] *concessum mihi tempus.*

[3] *utque talentum a Deo concreditum, non ut prius Trapezitis particularibus, sed exactabilis publicis, quæ nunquam exhaurientur et usuram pro certo reddent, committerem.*

[4] *ante annos aliquot.*

[5] *decrevi certe in cæteris ejus partibus minime defatisci. Quod etiam nunc ago.*

For "I think to proceed" the Cambridge MS. has "I have proceeded."

[6] *quibus non potuerim majora, cum tam insigni approbatione et honore . . . . expectare.*

[7] *hominum, præsertim vulgaris judicii.*

[8] *per exempla quædam et portiones Naturalis Historiæ, et Inquisitiones super eam. quod etiam ex parte feci.*

The *Historia Ventorum* was published about the beginning of November 1622, and the *Historia Vitæ et Mortis* about the end of the following January; after the English version of this letter was written, probably, and before it was translated. In the Cambridge MS., which appears to be of an earlier date than Rawley's copy, the last sentence stands thus: "I have taken a course to draw it down to the sense, which cannot fail."

a translation of that book into the general language[1], not without great and ample additions[2] and enrichment thereof, especially in the second book, which handleth the Partition of Sciences; in such sort, as I hold it may serve in lieu of the first part of the Instauration, and acquit my promise in that part.[3] Again, because I cannot altogether desert the civil person that I have borne; which if I should forget, enough would remember; I have also entered into a work touching Laws, propounding a character of Justice, in a middle term, between the speculative and reverend discourses of philosophers, and the writings of lawyers which are tied and obnoxious to their particular laws.[4] And although it be true, that I had a purpose to make a particular digest or recompilement of the laws of mine own nation; yet because it is a work of assistance, and that that I cannot master by mine own forces and pen[5], I have laid it aside. Now having in the work of my Instauration had in contemplation the general good of men in their very being, and the dowries of nature[6]: and in my work of Laws[7], the general good of men likewise in society, and the dowries of government; I thought in duty I owed somewhat unto mine own country, which I ever loved; insomuch as although my place hath been far above my desert, yet my thoughts and cares concerning the good thereof were beyond and over and above my place: so now being (as I am) no more able to do my country service, it remained unto me to do it honour[8]: which I have endeavoured to do in my work of The reign of King Henry the Seventh. As for my Essays, and some other particulars of that nature, I count them but as the recreations of my other studies, and in that sort purpose to

[1] *consentaneum putavi opus illud in linguam generalem ex vernacula vertere.*

[2] The Cambridge MS. has "not without some addition."

[3] *idque ita cumulate præstiti, ut judicem librum illum, jam in plures divisum, pro primâ* Instaurationis *parte haberi posse; quam* Partitionum Scientiarum *nomine antea insignivi: et sic fidem meam in hâc parte liberari confido. Atque hoc etiam jam peractum est.*

The *De Augmentis Scientiarum* was published in the autumn of 1623.

[4] The following sentence is added in the translation. *Hoc autem opus, quoniam tantum absorpturum fuisset temporis, atque alia jure præcedere deberent, infectum reliqui: solummodo portiunculam ejus quandam, ad exemplar, in uno ex libris* De Augmentis Scientiarum (*octavo scilicet*) *exhibui.*

[5] *quia plurimorum manibus indigebat neque ex me solo pendebat.*

[6] *universi generis humani bonum mihi ante oculos proposuerim; ut vita humana excoleretur, bearetur, et ampliori a naturâ dote donaretur.*

[7] *in opere autem illo de Legibus, cujus initia perstrinxi (ut dictum est).*

[8] *Quocirca (præsertim cum opus illud de Legibus Patriis deposuissem) honorem aliquam patriæ dilectæ exhibere volui.*

continue them[1]; though I am not ignorant that those kind of writings would with less pains and embracement (perhaps) yield more lustre and reputation to my name than those other which I have in hand. But I account the use that a man should seek of the publishing of his own writings before his death, to be but an untimely anticipation of that which is proper to follow a man and not to go along with him.[2]

But revolving with myself my writings, as well those which I have published, as those which I had in hand, methought they went all into the city, and none into the temple[3]; where because I have found so great consolation, I desire likewise to make some poor oblation. Therefore I have chosen an argument mixt of religious and civil considerations; and likewise mixt between contemplative and active.[4] For who can tell whether there may not be an *Exoriere aliquis?* Great matters (especially if they be religious) have (many times) small beginnings: and the platform may draw on the building. This work, because I was ever an enemy to flattering dedications, I have dedicated to your lordship, in respect of our ancient and private acquaintance; and because amongst the men of our times I hold you in special reverence.

Your lordship's loving friend,

FR. ST. ALBAN.

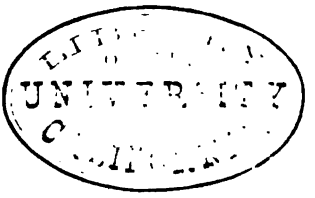
[1] *Quantum vero ad librum illum jampridem editum, cui antea titulus* Delibationes Morales et Civiles, *nunc autem* Sermones Fideles *sive* Interiora Rerum *inscribitur; eum etiam multipliciter auxi et ditavi: et in linguam quoque Latinam e vernacula verti curavi. Illud autem scriptorum genus animi reficiendi et levandi causa subinde tracto.*

The enlarged edition of the Essays was published in 1625 with the title *Essays or Counsels Civil and Moral.* The Latin translation may possibly have been going on at the same time, though it was not published during Bacon's life. It would seem however from this addition that the Latin version of this dedicatory letter was one of Bacon's latest writings.

[2] This sentence is omitted in the translation; and instead of it the following is inserted. *Quinetiam libellum meum* De Sapientia Veterum, *ut ab interitu tutior esset, in Tomo* Operum meorum Moralium et Politicorum *rursus edendum curavi.*

[3] *Exceptis paucis* (the translation adds) *alicubi inspersis, quæ ad Religionem spectant.*

[4] *Tractatum scilicet* De Bello Sacro.



AN

ADVERTISEMENT[1]

TOUCHING

AN HOLY WAR.

The Persons that speak.

EUSEBIUS. GAMALIEL. ZEBEDÆUS. MARTIUS. EUPOLIS. POLLIO.

Characters of the Persons.

Eusebius beareth the character of a Moderate Divine. Gamaliel of a Protestant Zelant. Zebedæus of a Romish Catholic Zelant. Martius of a Militar Man. Eupolis of a Politique. Pollio of a Courtier.[2]

THERE met at Paris (in the house of Eupolis) Eusebius, Zebedæus, Gamaliel, Martius, all persons of eminent quality, but of several dispositions. Eupolis himself was also present; and while they were set in conference, Pollio came in to them from court; and as soon as he saw them, after his witty and pleasant manner, he said:

POLLIO. Here be four of you, I think were able to make a good World; for you are as differing as the four Elements, and yet you are friends. As for Eupolis, because he is temperate and without passion, he may be the Fifth Essence.

EUPOLIS. If we five (Pollio) make the Great World, you alone may make the Little; because you profess and practise both, to refer all things to yourself.

POLLIO. And what do they that practise it, and profess it not?

[1] *Dialogus.*

[2] Zebedæus *Romano-Catholicus, fervidus et Zelotes.* Gamaliel, *in Religione Reformatâ, fervidus item et Zelotes.* Eusebius, *Theologus Orthodoxus et moderatus.* Martius, *vir Militaris.* Eupolis, *Politicus.* Pollio, *Aulicus. Omnes præter Gamalielem Romano-Catholici.*

EUPOLIS. They are the less hardy[1], and the more dangerous. But come and sit down with us, for we were speaking of the affairs of Christendom at this day; wherein we would be glad also to have your opinion.

POLLIO. My lords, I have journeyed this morning, and it is now the heat of the day; therefore your lordship's discourses had need content my ears very well, to make them intreat mine eyes to keep open. But yet if you will give me leave to awake you, when I think your discourses do but sleep, I will keep watch the best I can.

EUPOLIS. You cannot do us a greater favour. Only I fear you will think all our discourses to be but the better sort of dreams; for good wishes, without power to effect[2], are not much more. But, Sir, when you came in, Martius had both raised our attentions and affected us with some speech he had begun; and it falleth out well to shake off your drowsiness; for it seemed to be the trumpet of a War. And therefore (Martius) if it please you to begin again; for the speech was such as deserveth to be heard twice; and I assure you, your auditory is not a little amended by the presence of Pollio.

MARTIUS. When you came in (Pollio), I was saying freely to these lords, that I had observed how by the space now of half a century of years there had been (if I may speak it) a kind of meanness in the designs and enterprises of Christendom. Wars with subjects; like an angry suit for a man's own, that mought be better ended by accord. Some petty acquests of a town, or a spot of territory; like a farmer's purchase of a close or nook of ground that lay fit for him. And although the wars had been for a Naples, or a Milan, or a Portugal, or a Bohemia, yet these wars were but as the wars of Heathen, (of Athens, or Sparta, or Rome,) for secular interest or ambition, not worthy the warfare of Christians. The Church (indeed) maketh her missions into the extreme parts of the nations and isles; and it is well[3]: but this is *Ecce unus gladius hic.* The Christian princes and potentates are they that are wanting to the propagation of the Faith by their arms. Yet our Lord, that said on earth to the disciples, *Ite et prædicate,* said from heaven to Constantine, *In hoc signo vince.* What Christian soldier is there that will not be touched with a religious emula-

[1] *minus animosi.*
[2] *absque spe effectûs, nedum tentandi copiâ.*
[3] *nobili operâ atque instituto.*

tion to see an order of Jesus, or of St. Francis, or of St. Augustine, do such service for enlarging the Christian borders; and an order of St. Jago, or St. Michael, or St. George, only to robe, and feast, and perform rites and observances?[1] Surely the merchants themselves shall rise in judgment against the princes and nobles of Europe. For they have made a great path in the seas unto the ends of the world; and set forth ships and forces of Spanish, English, and Dutch, enough to make China tremble[2]; and all this for pearl, or stone, or spices: but for the pearl of the kingdom of heaven, or the stones of the heavenly Hierusalem, or the spices of the spouse's garden, not a mast hath been set up. Nay they can make shift to shed Christian blood so far off amongst themselves[3], and not a drop for the cause of Christ. But let me recall myself; I must acknowledge that within the space of fifty years (whereof I spake) there have been three noble and memorable actions upon the infidels, wherein the Christian hath been the invader. For where it is upon the defensive, I reckon it a war of nature[4], and not of piety. The first was that famous and fortunate war by sea that ended in the victory of Lepanto; which hath put a hook into the nostrils of the Ottomans to this day; which was the work (chiefly) of that excellent Pope, Pius Quintus; whom I wonder his successors have not declared a saint. The second was the noble, though unfortunate, expedition of Sebastian King of Portugal upon Africk, which was atchieved by him alone; so alone, as left somewhat for others to excuse. The last was, the brave incursions of Sigismund the Transylvanian prince; the thread of whose prosperity was cut off by the Christians themselves; contrary to the worthy and paternal monitories of Pope Clement the eighth. More than these, I do not remember.

POLLIO. No! What say you to the extirpation of the Moors of Valentia?

At which sudden question, Martius was a little at a stop; and Gamaliel prevented him, and said:

[1] *nihil aliud fere perpetrare, neque majora meditari, quam ut vestes solennes induant, festa patronorum suorum anniversaria celebrent, et cæteros ritus ac cæremonias ordinis sui observent.*

[2] *quanta Indias quidem et Chinam tremefacere et concutere possint.*

[3] *Illud interim pro nihilo ducunt, sanguinem Christianum in partibus tam remotis inter se prœliantes effundere.*

[4] *Necessitatis.*

GAMALIEL. I think Martius did well in omitting that action, for I, for my part, never approved it; and it seems God was not well pleased with that deed; for you see the king in whose time it passed (whom you catholics count a saint-like and immaculate prince) was taken away in the flower of his age: and the author and great counsellor of that rigour (whose fortunes seemed to be built upon the rock) is ruined: and it is thought by some that the reckonings of that business are not yet cleared with Spain; for that numbers of those supposed Moors, being tried now by their exile, continue constant in the faith, and true Christians in all points, save in the thirst of revenge.

ZEBEDÆUS. Make not hasty judgment (Gamaliel) of that great action; which was as Christ's fan in those countries; except you could show some such covenant from the crown of Spain, as Joshua made with the Gibeonites; that that cursed seed should continue in the land. And you see it was done by edict, not tumultuously; the sword was not put into the people's hand.

EUPOLIS. I think Martius did omit it, not as making any judgment of it either way, but because it sorted not aptly with actions of war, being upon subjects, and without resistance. But let us, if you think good, give Martius leave to proceed in his discourse; for methought he spake like a divine in armour.

MARTIUS. It is true (Eupolis) that the principal object which I have before mine eyes, in that whereof I speak, is piety and religion. But nevertheless, if I should speak only as a natural man, I should persuade the same thing. For there is no such enterprise, at this day, for secular greatness and terrene honour, as a war upon infidels. Neither do I in this propound a novelty, or imagination, but that which is proved by late examples of the same kind, though perhaps of less difficulty. The Castilians, the age before that wherein we live, opened the new world; and subdued and planted Mexico, Peru, Chile, and other parts of the West Indies. We see what floods of treasure have flowed into Europe by that action; so that the cense or rates of Christendom are raised since ten times, yea twenty times told. Of this treasure, it is true, the gold was accumulate and store-treasure, for the most part: but the silver is still growing. Besides, infinite is the access of territory and empire by the same enterprise. For there was never an hand drawn that did

double the rest of the habitable world, before this; for so a man may truly term it, if he shall put to account as well that that is, as that which may be hereafter by the further occupation and colonizing of those countries. And yet it cannot be affirmed (if one speak ingenuously) that it was the propagation of the Christian faith that was the adamant of that discovery, entry, and plantation; but gold and silver and temporal profit and glory: so that what was first in God's providence was but second in man's appetite and intention. The like may be said of the famous navigations and conquests of Emmanuel King of Portugal, whose arms began to circle Africk and Asia; and to acquire not only the trade of spices and stones and musk and drugs, but footing and places in those extreme parts of the east. For neither in this was religion the principal, but amplification and enlargement of riches and dominion. And the effect of these two enterprises is now such, that both the East and the West Indies being met in the crown of Spain, it is come to pass that (as one saith in a brave kind of expression) *the sun never sets in the Spanish dominions, but ever shines upon one part or other of them:* which, to say truly, is a beam of glory, (though I cannot say it is so solid a body of glory) wherein the crown of Spain surpasseth all the former monarchies. So as to conclude, we may see that in these actions upon gentiles or infidels, only or chiefly, both the spiritual and temporal honour and good have been in one pursuit and purchase conjoined.

POLLIO. Methinks, with your favour, you should remember (Martius) that wild and savage people are like beasts and birds, which are *feræ naturæ*, the property of which passeth with the possession, and goeth to the occupant; but of civil people, it is not so.

MARTIUS. I know no such difference amongst reasonable souls, but that whatsoever is in order to the greatest and most general good of people may justify the action, be the people more or less civil. But (Pollio)[1] I shall not easily grant that the people of Peru or Mexico were such brute savages as you intend; or that there should be any such difference between them and many of the infidels which are now in other parts. In Peru, though they were unapparelled people, according to the

[1] So in the Latin, and in the MSS. The printed copy has *Eupolis*; obviously a mistake.

clime[1]; and had some customs very barbarous; yet the government of the Incaes had many parts of humanity and civility. They had reduced the nations from the adoration of a multitude of idols and fancies, to the adoration of the sun. And, as I remember, the Book of Wisdom noteth degrees of idolatry; making that of worshipping petty and vile idols more gross than simply the worshipping of the creature. And some of the prophets, as I take it, do the like, in the metaphor of more ugly and bestial fornication. The Peruvians also (under the Incaes) had magnificent temples of their superstition; they had strict and regular justice; they bare great faith and obedience to their kings; they proceeded in a kind of martial justice with their enemies[2], offering them their law, as better for their own good, before they drew their sword. And much like was the state of Mexico, being an elective[3] monarchy. As for those people of the east (Goa, Calacute, Malacca) they were a fine and dainty people; frugal and yet elegant, though not militar. So that if things be rightly weighed, the empire of the Turks may be truly affirmed to be more barbarous than any of these. A cruel tyranny, bathed in the blood of their emperors upon every succession; a heap of vassals and slaves; no nobles, no gentlemen, no freemen, no inheritance of land, no stirp of ancient families[4]; a people that is without natural affection, and, as the Scripture saith, that *regardeth not the desires of women:* and without piety or care towards their children: a nation without morality, without letters, arts, or sciences; that can scarce measure an acre of land, or an hour of the day: base and sluttish in buildings, diets, and the like; and in a word, a very reproach of human society. And yet this nation hath made the garden of the world a wilderness; for that, as it is truly said concerning the Turks, *where Ottoman's horse sets his foot, people will come up very thin.*

POLLIO. Yet in the midst of your invective (Martius) do the Turks this right, as to remember that they are no idolaters: for if, as you say, there be a difference between worshipping a base idol and the sun, there is a much greater difference between worshipping a creature and the Creator. For the Turks do acknowledge God the Father, creator of heaven and earth,

[1] *temperatura fortasse climatis hoc postulante.*

[2] *ac si jus fœcialium novissent.* [3] *electivâ, non hæreditariâ.*

[4] *nullæ stirpes antiquæ.* I have followed the reading of the MS. here. The printed copy has "no stirp *or* ancient families."

being the first person in the Trinity, though they deny the rest.

At which speech when Martius made some pause, Zebedæus replied with a countenance of great reprehension and severity:

ZEBEDÆUS. We must take heed (Pollio) that we fall not at unawares into the heresy of Manuel Comnenus, Emperor of Græcia, who affirmed that Mahomet's God was the true God: which opinion was not only rejected and condemned by the synod, but imputed to the Emperor as extreme madness[1]; being reproached to him also by the Bishop of Thessalonica, in those bitter and strange words as are not to be named.

MARTIUS. I confess that it is my opinion, that a war upon the Turk is more worthy than upon any other gentiles, infidels, or savages, that either have been or now are, both in point of religion and in point of honour; though facility and hope of success mought (perhaps) invite some other choice. But before I proceed, both myself would be glad to take some breath; and I shall frankly desire that some of your lordships would take your turn to speak, that can do it better. But chiefly, for that I see here some that are excellent interpreters of the divine law, though in several ways; and that I have reason to distrust mine own judgment, both as weak in itself, and as that which may be overborne by my zeal and affection to this cause; I think it were an error to speak further, till I may see some sound foundation laid of the lawfulness of the action, by them that are better versed in that argument.

EUPOLIS. I am glad (Martius) to see in a person of your profession so great moderation, in that you are not transported, in an action that warms the blood and is appearing holy, to blanch or take for admitted the point of lawfulness. And because methinks this conference prospers, if your lordships will give me leave, I will make some motion touching the distribution of it into parts.

Unto which when they all assented, Eupolis said:

EUPOLIS. I think it would not sort amiss, if Zebedæus would be pleased to handle the question, Whether a war for the propagation of the Christian faith, without other cause of hostility, be lawful or no, and in what cases? I confess also, I would be glad to go a little further; and to hear it spoken to

[1] *veluti insaniæ species quædam.*

concerning the lawfulness, not only permissively, but whether it be not obligatory to Christian princes and states to design it; which part, if it please Gamaliel to undertake, the point of the lawfulness taken simply will be complete. Yet there resteth the comparative: that is, it being granted that it is either lawful or binding, yet whether other things be not to be preferred before it; as extirpation of heretics, reconcilements of schisms, pursuit of lawful temporal rights and quarrels, and the like; and how far this enterprise ought either to wait upon these other matters, or to be mingled with them, or to pass by them and give law to them as inferior unto itself? And because this is a great part, and Eusebius hath yet said nothing, we will by way of mulct or pain, if your lordships think good, lay it upon him. All this while, I doubt much that Pollio, who hath a sharp wit of discovery towards what is solid and real and what is specious and airy, will esteem all this but impossibilities, and eagles in the clouds: and therefore we shall all intreat him to crush this argument with his best forces: that by the light we shall take from him, we may either cast it away, if it be found but a bladder, or discharge it of so much as is vain and not sperable. And because I confess I myself am not of that opinion, (although it be an hard encounter to deal with Pollio) yet I shall do my best to prove the enterprise possible, and to shew how all impediments may be either removed or overcomen. And then it will be fit for Martius (if we do not desert it before) to resume his further discourse, as well for the persuasive, as for the consult touching the means, preparations, and all that may conduce unto the enterprise. But this is but my wish, your lordships will put it into better order.

They all not only allowed the distribution, but accepted the parts: but because the day was spent, they agreed to defer it till the next morning. Only Pollio said:

POLLIO. You take me right (Eupolis); for I am of opinion, that except you could bray Christendom in a mortar, and mould it into a new paste, there is no possibility of an Holy War. And I was ever of opinion, that the Philosopher's Stone, and an Holy War, were but the *rendez-vous* of cracked brains, that wore their feather in their head instead of their hat. Nevertheless believe me of courtesy, that if you five shall be of another mind, especially after you have heard what I can say, I shall be ready to certify

with Hippocrates, that Athens[1] is mad and Democritus is only sober.[2] And lest you should take me for altogether adverse, I will frankly contribute to the business now at first. Ye, no doubt, will amongst you devise and discourse many solemn matters: but do as I shall tell you. This Pope is decrepit, and the bell goeth for him. Take order, that when he is dead, there be chosen a Pope of fresh years, between fifty and threescore; and see that he take the name of Urban, because a Pope of that name did first institute the cruzada, and (as with an holy trumpet) did stir up the voyage for the Holy Land.

EUPOLIS. You say well; but be, I pray you, a little more serious in this conference.

The next day the same persons met, as they had appointed; and after they were set, and that there had passed some sporting speeches from Pollio, how the war was already begun, for that (he said) he had dreamt of nothing but Janizaries and Tartars and Sultans all the night long, Martius said:

MARTIUS. The distribution of this conference, which was made by Eupolis yesternight, and was by us approved, seemeth to me perfect, save in one point; and that is, not in the number, but in the placing of the parts. For it is so disposed, that Pollio and Eupolis shall debate the possibility or impossibility of the action, before I shall deduce the particulars of the means and manner by which it is to be achieved. Now I have often observed in deliberations, that the entering near hand into the manner of performance and execution of that which is under deliberation hath quite overturned the opinion formerly conceived of the possibility or impossibility. So that things that at the first show seemed possible, by ripping up the performance of them have been convicted of impossibility; and things that on the other side have showed impossible, by the declaration of the means to effect them, as by a back light, have appeared possible, the way thorough them being discerned. This I speak, not to alter the order, but only to desire Pollio and Eupolis not to speak peremptorily or conclusively touching the point of possibility, till they have heard me deduce the means of the execution: and that done, to reserve themselves at liberty

[1] So both the printed copy and the MSS. The Latin translation has *Athenienses*. It ought to be *Abdera*.

[2] The remainder of this speech is not in the MS. Eupolis's answer is illegible from the fading of the ink. The words, I think, are "at your pleasure."

for a reply, after they had before them, as it were, a model of the enterprise.

This grave and solid advertisement and caution of Martius was much commended by them all; whereupon Eupolis said:

EUPOLIS. Since Martius hath begun to refine that which was yesternight resolved, I may the better have leave (especially in the mending of a proposition which was mine own) to remember an omission, which is more than a misplacing. For I doubt we ought to have added or inserted into the point of lawfulness, the question how far an Holy War is to be pursued, whether to displanting and extermination of people? And again, whether to enforce a new belief, and to vindicate or punish infidelity; or only to subject the countries and people; and so by the temporal sword to open a door for the spiritual sword to enter, by persuasion, instruction, and such means as are proper for souls and consciences? But it may be, neither is this necessary to be made a part by itself; for that Zebedæus, in his wisdom, will fall into it as an incident to the point of lawfulness, which cannot be handled without limitations and distinctions.

ZEBEDÆUS. You encourage me (Eupolis), in that I perceive how in your judgment (which I do so much esteem) I ought to take that course which of myself I was purposed to do. For as Martius noted well that it is but a loose thing to speak of possibilities without the particular designs; so is it to speak of lawfulness without the particular cases. I will therefore first of all distinguish the cases; though you shall give me leave in the handling of them not to sever them with too much preciseness; for both it would cause needless length, and we are not now in arts or methods, but in a conference. It is therefore first to be put to question in general, (as Eupolis propounded it,) whether it be lawful for Christian princes or states to make an invasive war, only and simply for the propagation of the faith, without other cause of hostility, or circumstance that may provoke and induce the war? Secondly, whether, it being made part of the case that the countries were once Christian and members of the Church and where the golden candlesticks did stand, though now they be utterly alienated and no Christians left, it be not lawful to make a war to restore them to the Church, as an ancient patrimony of Christ?

Thirdly, if it be made a further part of the case, that there are yet remaining in the countries multitudes of Christians, whether it be not lawful to make a war to free them and deliver them from the servitude of the infidels? Fourthly, whether it be not lawful to make a war for the purging and recovery of consecrate places, being now polluted and profaned; as the Holy City and Sepulchre, and such other places of principal adoration and devotion? Fifthly, whether it be not lawful to make a war for the revenge or vindication of blasphemies and reproaches against the Deity and our blessed Saviour; or for the effusion of Christian blood, and cruelties against Christians, though ancient and long since past; considering that God's visits are without limitation of time, and many times do but expect the fulness of the sin? Sixthly, it is to be considered (as Eupolis now last well remembered) whether a Holy War (which, as in the worthiness of the quarrel, so in the justness of the prosecution, ought to exceed all temporal wars) may be pursued either to the expulsion of people or the enforcement of consciences or the like extremities; or how to be moderated and limited; lest whilst we remember we are Christians, we forget that others are men?[1] But there is a point that pre-

[1] The passage which follows, to the end of the paragraph, is not in the Harl. MS. It is one of the passages which appear to have been inserted on revision, and to which I alluded in the preface as indicating an intention to limit the Holy War to a war against the Turks specially, and a war not for religion simply, but with "a mixture of civil titles." The same thing is observable in Zebedæus's next speech, which was probably written at a later period: for the MS. merely inserts the name and breaks off with an &c.

A series of questions relating to this subject, found among Bacon's papers, and printed by Tenison in the Baconiana (p. 179.) with the title "The Lord Bacon's Questions about the Lawfulness of a War for the Propagation of Religion," may be most conveniently inserted here; being in fact merely a note of the questions which he intended to discuss in this dialogue, and which we have just seen set forth more at large.

Questions wherein I desire opinion, joined with arguments and authorities.

Whether a war be lawful against infidels, only for the propagation of the Christian faith, without other cause of hostility?

Whether a war be lawful to recover to the Church countries which formerly have been Christian, though now alienate, and Christians utterly extirped?

Whether a war be lawful to free and deliver Christians that yet remain in servitude and subjection to infidels?

Whether a war be lawful in revenge or vindication of blasphemy and reproaches against the Deity and our Saviour? or for the ancient effusion of Christian blood, and cruelties upon Christians?

Whether a war be lawful for the restoring and purging of the holy land, the sepulchre, and other principal places of adoration and devotion?

Whether, in the cases aforesaid, it be not obligatory to Christian princes to make such a war, and not permissive only?

Whether the making of a war against the infidels be not first in order of dignity, and to be preferred before extirpations of heresies, reconcilements of schisms, reformation of manners, pursuits of just temporal quarrels, and the like actions for the public

cedeth all these points recited; nay and in a manner dischargeth them, in the particular of a war against the Turk: which point, I think, would not have come into my thought, but that Martius giving us yesterday a representation of the empire of the Turks, with no small vigour of words, (which you, Pollio, called an invective, but was indeed a true charge,) did put me in mind of it: and the more I think upon it, the more I settle in opinion, that a war to suppress that empire, though we set aside the cause of religion, were a just war.

After Zebedæus had said this, he made a pause, to see whether any of the rest would say anything: but when he perceived nothing but silence and signs of attention to that he would further say, he proceeded thus:

ZEBEDÆUS. Your lordships will not look for a treatise from me[1], but a speech of consultation; and in that brevity and manner will I speak. First, I shall agree, that as the cause of a war ought to be just, so the justice of that cause ought to be evident; not obscure, not scrupulous. For by the consent of all laws, in capital causes the evidence must be full and clear: and if so where one man's life is in question, what say we to a war, which is ever the sentence of death upon many? We must beware therefore how we make a Moloch or an heathen idol of our blessed Saviour, in sacrificing the blood of men to him by an unjust war. The justice of every action consisteth in the merits of the cause, the warrant of the jurisdiction, and the form of the prosecution. As for the inward intention, I leave it to the court of heaven. Of these things severally, as they may have relation to the present subject of a war against infidels; and namely, against the most potent and most dangerous enemy of the faith, the Turk. I hold, and I doubt not but I shall make it plain (as far as a sum or brief can make a cause plain), that a war against the Turk is lawful, both by the laws of nature and nations, and by the law divine, which is the perfection of the other two. As for the laws positive and civil of the Romans, or other whatsoever, they are too small engines to move the weight of this question. And therefore, in my judgment, many of the late Schoolmen (though excellent men)

good; except there be either a more urgent necessity, or a more evident facility in those inferior actions, or except they may both go on together in some degree?

[1] *in hac quæstione de jure Belli Sacri contra Turcas.*

take not the right way in disputing this question; except they had they gift of Navius, that they could, *cotem novaculâ scindere; hew stones with pen-knives.* First, for the law of nature. The philosopher Aristotle is no ill interpreter thereof. He hath set many men on work with a witty speech of *naturâ dominus*, and *naturâ servus;* affirming expressly and positively, *that from the very nativity some things are born to rule, and some things to obey.* Which oracle hath been taken in divers senses. Some have taken it for a speech of ostentation, to intitle the Grecians to an empire over the barbarians; which indeed was better maintained by his scholar Alexander. Some have taken it for a speculative platform, that reason and nature would that the best should govern; but not in any wise to create a right. But for my part, I take it neither for a brag nor for a wish; but for a truth, as he limiteth it. For he saith, that if there can be found such an inequality between man and man as there is between man and beast or between soul and body, it investeth a right of government; which seemeth rather an impossible case than an untrue sentence. But I hold both the judgment true, and the case possible; and such as hath had and hath a being, both in particular men and nations. But ere we go further, let us confine ambiguities and mistakings, that they trouble us not.[1] First, to say that the more capable, or the better deserver, hath such right to govern as he may compulsorily bring under the less worthy, is idle. Men will never agree upon it, who is the more worthy. For it is not only in order of nature for him to govern that is the more intelligent, as Aristotle would have it; but there is no less required for government, courage to protect; and above all, honesty and probity of the will, to abstain from injury. So fitness to govern is a perplexed business. Some men, some nations, excel in the one ability, some in the other. Therefore the position which I intend is not in the comparative, that the wiser or the stouter or the juster nation should govern; but in the privative, that where there is an heap of people (though we term it a kingdom or state) that is altogether unable or indign to govern, there it is a just cause of war for another nation, that is civil or polliced, to subdue them: and this, though it were to be done by a Cyrus or a Cæsar, that were no Christian. The second mis-

[1] *Ambigua quædam, et a sensu vero sermonis nostri multum aberrantia, ne interpellant, abigamus et relegemus.*

taking to be banished is, that I understand not this of a personal tyranny, as was the state of Rome under a Caligula or a Nero or a Commodus: shall the nation suffer for that wherein they suffer? But when the constitution of the state and the fundadamental customs and laws of the same (if laws they may be called) are against the laws of nature and nations, then, I say, a war upon them is lawful. I shall divide the question into three parts. First, whether there be, or may be, any nation or society of men, against whom it is lawful to make a war without a precedent injury or provocation? Secondly, what are those breaches of the law of nature and nations, which do forfeit and devest all right and title in a nation to govern? And thirdly, whether those breaches of the law of nature and nations be found in any nation at this day; and namely, in the empire of the Ottomans? For the first, I hold it clear that such nations, or states, or societies of people, there may be and are. There cannot be a better ground laid to declare this, than to look into the original donation of government. Observe it well, especially the inducement or preface. Saith God: *Let us make man after our own image, and let him have dominion over the fishes of the sea, and the fowls of the air and the beasts of the land, &c.* Hereupon De Victoria[1], and with him some others, infer excellently, and extract a most true and divine aphorism, *Non fundatur dominium nisi in imagine Dei.* Here we have the charter of foundation: it is now the more easy to judge of the forfeiture or reseizure. Deface the image, and you devest the right. But what is this image, and how is it defaced? The poor men of Lyons, and some fanatical spirits, will tell you that the image of God is purity, and the defacement sin. But this subverteth all government: neither did Adam's sin, or the curse upon it, deprive him of his rule, but left the creatures to a rebellion or reluctation. And therefore if you note it attentively, when this charter was renewed unto Noah and his sons, it is not by the words, *You shall have dominion;* but, *Your fear shall be upon all the beasts of the land, and the birds of the air, and all that moveth:* not regranting the sovereignty, which stood firm; but protecting it against the reluctation. The sound interpreters therefore expound this image of God, of Natural Reason; which if it be totally or mostly defaced, the right of government doth cease; and if you mark all the inter-

[1] *Franciscus de Victoriâ.*

preters well, still they doubt of the case, and not of the law. But this is properly to be spoken to in handling the second point, when we shall define of the defacements. To go on. The prophet Hosea, in the person of God, saith of the Jews: *They have reigned, but not by me; they have set a signory over themselves, but I knew nothing of it.* Which place proveth plainly, that there are governments which God doth not avow. For though they be ordained by his secret providence, yet they are not knowledged by his revealed will. Neither can this be meant of evil governors or tyrants; for they are often avowed and stablished as lawful potentates; but of some perverseness and defection in the very nation itself; which appeareth most manifestly, in that the prophet speaketh of the signory *in abstracto*, and not of the person of the Lord. And although some heretics, of those we spake of, have abused this text, yet the sun is not soiled in passage.[1] And again, if any man infer upon the words of the prophets following (which declare this rejection and, to use the words of the text, rescision[2] of their estate to have been for their idolatry,) that by this reason the governments of all idolatrous nations should be also dissolved (which is manifestly untrue); in my judgment it followeth not. For the idolatry of the Jews then, and the idolatry of the Heathen then and now, are sins of a far differing nature, in regard of the special covenant and the clear manifestations wherein God did contract and exhibit himself to that nation. This nullity of policy and right of estate in some nations is yet more significantly expressed by Moses in his canticle, in the person of God, to the Jews: *Ye have incensed me with gods that are no gods, and I will incense you with a people that are no people:* such as were (no doubt) the people of Canaan[3], after seisin was given of the Land of Promise to the Israelites. For from that time their right to the land was dissolved, though they remained in many places unconquered. By this we may see that there are nations in name, that are no nations in right, but multitudes only, and swarms of people. For like as there are particular persons utlawed and proscribed by civil laws of several countries; so are there nations that are utlawed and proscribed by the law of nature and nations, or by the immediate commandment of God. And as there are kings *de facto*,

[1] *in transitu per cloacas.*
[2] This clause is omitted in the translation.
[3] *populi Cananæorum, et reliqui.*

and not *de jure*, in respect of the nullity of their title; so are there nations that are occupants *de facto*, and not *de jure*, of their territories, in respect of the nullity of their policy or government. But let us take in some examples into the midst of our proofs; for they will prove as much, as put after, and illustrate more. It was never doubted but a war upon pirates may be lawfully made by any nation, though not infested or violated by them. Is it because they have not *certas sedes* or *lares?* In the Piratical War which was achieved by Pompey the Great, and was his truest and greatest glory, the pirates had some cities, sundry ports, and a great part of the province of Cilicia; and the pirates now being, have a receptacle and mansion in Algiers. Beasts are not the less savage because they have dens. Is it because the danger hovers as a cloud, that a man cannot tell where it will fall, and so it is every man's case? The reason is good; but it is not all, nor that which is most alledged. For the true received reason is, that pirates are *communes humani generis hostes;* whom all nations are to prosecute, not so much in the right of their own fears, as upon the band of human society. For as there are formal and written leagues, respective to certain enemies; so is there a natural and tacit confederation amongst all men against the common enemy of human society. So as there needs no intimation or denunciation of the war; there needs no request from the nation grieved: but all these formalities the law of nature supplies in the case of pirates. The same is the case of rovers by land[1]; such as yet are some cantons in Arabia; and some petty kings of the mountains, adjacent to straits and ways.[2] Neither is it lawful only for the neighbour princes, to destroy such pirates or rovers[3]; but if there were any nation never so far off, that would make it an enterprise of merit and true glory, (as the Romans that made a war for the liberty of Græcia from a distant and remote part,) no doubt they mought do it.[4] I make the same judgment of that kingdom of the Assassins, now destroyed, which was situate upon the borders of Saraca; and was for a time a great terror to all the princes of the Levant. There the custom was, that upon the command-

[1] *de latronibus per terram et insidiatoribus viarum.*

[2] *qui secus angustas vias et a viatoribus frequentatas habitant.*

[3] *neque (ut prius de Piratis dictum est) principibus tantum vicinis hos debellare conceditur.*

[4] *Proculdubio hoc facere cum justitia possint.*

ment of their king, and a blind obedience to be given thereunto, any of them was to undertake, in the nature of a votary, the insidious murder of any prince or person upon whom the commandment went. This custom, without all question, made their whole government void[1], as an engine built against human society, worthy by all men to be fired and pulled down. I say the like of the Anabaptists of Munster; and this, although they had not been rebels to the empire: and put case likewise that they had done no mischief at all actually; yet if there shall be a congregation and consent of people[2] that shall hold all things to be lawful, not according to any certain laws or rules, but according to the secret and variable motions and instincts of the spirit; this is indeed no nation, no people, no signory, that God doth know; any nation that is civil and polliced may (if they will not be reduced) cut them off from the face of the earth.[3] Now let me put a feigned case, (and yet antiquity makes it doubtful whether it were fiction or history,) of a land of Amazons, where the whole government public and private, yea the militia itself, was in the hands of women. I demand, is not such a preposterous government (against the first order of nature, for women to rule over men,) in itself void, and to be suppressed?[4] I speak not of the reign of women, (for that is supplied by counsel and subordinate magistrates masculine,) but where the regiment of state, justice, families, is all managed by women. And yet this last case differeth from the other before; because in the rest there is terror of danger, but in this there is only error of nature.[5] Neither should I make any great difficulty to affirm the same of the Sultanry of the Mamaluches; where slaves, and none but slaves, bought for money and of unknown descent, reigned over families of freemen. And much like were the case, if you suppose a nation where the custom were, that after full age the sons should expulse their fathers and mothers out of their possessions, and put them to their pensions: for these cases, of women to govern men,

[1] *totum illud regimen invalidum reddidit, et nullo jure subnixum.*

[2] *Quin et si adhuc fuerit, aut in futurum exorturus sit, hominum cœtus aliquis, qui, &c.*

[3] *cuivis sane nationi populum hunc (si ad sanitatem redire recuset) exterminare penitus ex cœtu hominum et a facie terræ delere licebit.* The word *polliced* (which I leave in the original spelling, not knowing any modern form of it) is translated, where it occurs at the bottom of p. 29., *ad imperandum habili.*

[4] *Num quis sanæ mentis affirmaverit, hujusmodi imperium, contra ordinem naturæ in principiis suis institutum, non esse in se vacuum et nullum et prorsus abolendum?*

[5] *in hoc autem aberratio tantum a lege naturæ.*

sons the fathers, slaves freemen, are much in the same degree; all being total violations and perversions of the laws of nature and nations. For the West Indies, I perceive (Martius) you have read Garcilazzo de Viega, who himself was descended of the race of the Incaes, a Mestizo, and is willing to make the best of the virtues and manners of his country: and yet in troth he doth it soberly and credibly enough.[1] Yet you shall hardly edify me, that those nations might not by the law of nature have been subdued by any nation that had only policy and moral virtue; though the propagation of the faith (whereof we shall speak in the proper place)[2] were set by, and not made part of the case. Surely their nakedness (being with them, in most parts of that country, without all veil or covering,) was a great defacement: for in the acknowledgement of nakedness was the first sense of sin; and the heresy of the Adamites was ever accounted an affront of nature. But upon these I stand not[3]; nor yet upon their idiocy, in thinking that horses did eat their bits, and letters speak, and the like: nor yet upon their sorceries, which are (almost) common to all idolatrous nations.[4] But, I say, their sacrificing, and more especially their eating of men, is such an abomination, as (methinks) a man's face should be a little confused, to deny that this custom, joined with the rest[5], did not make it lawful for the Spaniards to invade their territory, forfeited by the law of nature; and either to reduce them or displant them. But far be it from me yet nevertheless, to justify the cruelties which were at first used towards them: which had their reward soon after, there being not one of the principal of the first conquerors, but died a violent death himself; and was well followed by the deaths of many more.[6] Of examples enough: except we should add the labours of Her-

[1] *et perquam modeste.*

[2] The words within the parenthesis are omitted in the translation: an omission possibly accidental, but possibly also intentional; Bacon, as he considered the subject more closely, inclining more and more to disallow "the propagation of the faith" as a motive for an offensive war, and tending towards the opinion in which he rested two years afterwards, that "offensive wars for religion were seldom to be approved, or never except they have some mixture of civil titles."

[3] *Sed hoc fervoribus regionis detur: quandoquidem sit illis cum aliis nonnullis gentibus commune.*

[4] *Neque rursus simplicitatem eorum commemorare placet, licet insignis fuerit, utpote qui equos frœna ipsorum manducare, literas autem loqui et commissa sibi nunciare putarent; et similia. Neque etiam sortilegia, divinationes, et magicas superstitiones narro: in quibus cum plerisque gentibus idololatris communicabant.*

[5] *cum aliis improbissimis conjunctum.*

[6] *quemque etiam mors et calamitas complurium e suis non aut comitabatur aut a tergo insequebatur.*

cules; an example which, though it be flourished with much fabulous matter, yet so much it hath, that it doth notably set forth the consent of all nations and ages in the approbation of the extirpating and debellating of giants, monsters, and foreign tyrants[1], not only as lawful, but as meritorious even of divine honour[2]: and this although the deliverer came from the one end of the world unto the other.[3] Let us now set down some arguments to prove the same[4]; regarding rather weight than number, as in such a conference as this is fit. The first argument shall be this. It is a great error, and a narrowness or straitness of mind, if any man think that nations have nothing to do one with another, except there be either an union in sovereignty or a conjunction in pacts or leagues. There are other bands of society, and implicit confederations. That of colonies, or transmigrants, towards their mother nation. *Gentes unius labii* is somewhat; for as the confusion of tongues was a mark of separation, so the being of one language is a mark of union. To have the same fundamental laws and customs in chief is yet more, as it was between the Grecians in respect of the barbarians. To be of one sect or worship, if it be a false worship, I speak not of it, for that is but *fratres in malo*.[5] But above all these, there is the supreme and indissoluble consanguinity and society between men in general: of which the heathen poet (whom the apostle calls to witness[6]) saith, *We are all his generation.* But much more we Christians, unto whom it is revealed in particularity, that all men came from one lump of earth, and that two singular persons were the parents from whom all the generations of the world are descended; we (I say) ought to acknowledge that no nations are wholly aliens and strangers the one to the other; and not to be less charitable than the person introduced by the comic poet, *Homo sum, humani nihil a me alienum puto.* Now if there be such a tacit league or confederation, sure it is not idle; it is against somewhat, or somebody: who should they be? Is it against wild beasts? or the elements of fire and water? No, it is against

[1] *tyrannorum enormium.*

[2] *sed tanquam facinoribus egregiis; quaque divinos aut saltem heroicos honores mererentur.*

[3] *atque hoc, licet liberator ille, quisquis tandem sit, ex una orbis extremitate ad alteram penetraret.*

[4] *Jam autem, exemplis his prælibatis, ad argumenta redeamus.*

[5] This sentence is omitted in the translation.

[6] *Paulo Apostolo cituntur.*

such routs and shoals of people, as have utterly degenerate from the laws of nature; as have in their very body and frame of estate a monstrosity; and may be truly accounted (according to the examples we have formerly recited) common enemies and grievances of mankind; or disgraces and reproaches to human nature. Such people, all nations are interessed, and ought to be resenting, to suppress; considering that the particular states themselves, being the delinquents, can give no redress. And this, I say, is not to be measured so much by the principles of jurists, as by *lex charitatis; lex proximi;* which includes the Samaritan as well as the Levite; *lex filiorum Adæ de massâ unâ;* upon which original laws this opinion is grounded: which to deny (if a man may speak freely) were almost to be a schismatic in nature.

[*The rest was not perfected.*]

OF THE

TRUE GREATNESS OF BRITAIN.

PREFACE.

When the King of Scotland became King of England, with prospect of a line of successors to whom both crowns would naturally descend, the time had come for effecting such a union between the two countries that they should become as one, and never again be provoked to separate. It was an object in which both were equally interested. In such a union Bacon saw the removal of the one blot in the tables of England. Unassailable thenceforward except by sea, of which she was mistress, and prolific of a breed of men whose natural strength and courage made them a match for any, her natural advantages would be then complete. In advising the House of Commons to begin at once, as the first step towards a perfect union, by naturalising the whole Scotch nation, he concluded (after reviewing the objections and comparing the inconveniences on one side and on the other) by referring to the two great benefits which would be gained by thus "knitting the knot surer and straiter between the two kingdoms by the communication of naturalisation." Those benefits were Surety, and Greatness: Surety, because it would take away from foreign enemies their means of approach:

"And for Greatness, Mr. Speaker, I think a man may speak it soberly and without bravery, that this kingdom of England, having Scotland united, Ireland reduced, the sea provinces of the Low Countries contracted, and shipping maintained, is one of the greatest monarchies, in forces truly esteemed, that hath been in the world. For certainly the kingdoms here on earth have a resemblance with the kingdom of Heaven; which our Saviour compareth, not to any great kernel or nut, but to a very small grain, yet such an one as is apt to

grow and spread; and such do I take to be the constitution of this kingdom; if indeed we shall refer our counsels to greatness and power, and not quench them too much with the consideration of utility and wealth. For, Mr. Speaker, was it not, think you, a true answer that Solon of Greece made to the rich King Crœsus of Lydia, when he showed unto him a great quantity of gold that he had gathered together, in ostentation of his greatness and might? But Solon said to him, contrary to his expectation, 'Why, Sir, if another come that hath better iron than you, he will be lord of all your gold.' Neither is the opinion of Machiavel to be despised, who scorneth that proverb of state, taken first from a speech of Mucianus, that monies are the sinews of war; and saith 'There are no true sinews of war, but the very sinews of the arms of valiant men.'

"Nay more, Mr. Speaker, whosoever shall look into the seminaries and beginnings of the monarchies of the world, he shall find them founded in poverty . . . . And therefore, if I shall speak unto you mine own heart, methinks we should a little disdain that the nation of Spain, which however of late it hath grown to rule, yet of ancient time served many ages, first under Carthage, then under Rome, after under Saracens, Goths, and others, should of late years take unto themselves that spirit as to dream of a monarchy in the west, according to that device, *Video solem orientem in occidente*, only because they have ravished from some wild and unarmed people mines and store of gold; and on the other side that this island of Britain, seated and manned as it is, and that hath I make no question the best iron in the world, that is, the best soldiers in the world, shall think of nothing but reckonings and audits, and *meum* and *tuum*, and I cannot tell what."

So spoke Bacon on the 17th of February 1606-7; and the train of thought into which his argument had thus led him was probably the origin of the fragment which follows. As in the case of the preceding dialogue, his motive for taking up the subject, and for laying it by also, may be explained by reference to the political condition of England at the time. The relief from external enemies which followed the accession of James I. left internal discontents more freedom to ferment; and the natural progress of things was introducing a change in the relations between the Crown and the people, which was

hard to adjust, and threatened much mischief in the process. Formerly the patrimony of the Crown was sufficient in ordinary times to carry on the government without assistance from Parliament. It was only on extraordinary occasions, as of war or rebellion, that subsidies were indispensable. But the patrimony of the Crown did not increase in proportion to the increasing requirements of a country growing in numbers, extent, and importance in the world. All Elizabeth's frugality, coupled with all her art in inspiring zeal to serve her, and aided by many questionable expedients in the shape of patents and monopolies, had not sufficed to make her independent of Parliamentary subsidies; which in her latter years had become, contrary to ancient precedent, matters of annual necessity. Nor when reasons had to be given year after year for departing from those time-honoured precedents and inevitable exigencies of state to be pleaded in answer to dissentients, could all the art of her ministers or all her own fearless self-reliance disguise from the Commons the fact, that by refusing to vote the supplies they could place the government in a serious difficulty. This fact once recognised made the Commons potentially an overmatch for the Crown. They *could*, if they chose and had resolution to face the immediate consequences, make their own conditions with the Crown. Apprehension of those consequences, joined with force of custom and that conservative instinct which prevails in assemblies of Englishmen, made the majority hesitate to use their advantage all at once. But they had it; they knew they had it; and every debate on every grievance reminded them of it, and encouraged them to venture further on. In the absence of foreign quarrels the busy spirits of the time occupied themselves the more with internal discontents: and James had not been four years on the throne before Parliament had shown symptoms of a disposition which gave Bacon serious anxiety. In the *Commentarius Solutus*, to which I have frequently had occasion to refer (see Vol. III. p. 525.), I find two pages of memoranda relating to "Policy." They are set down so briefly,—the heads only, without the connexion, and many of the principal words indicated merely by the first two or three letters,—that one cannot gather much more than the general nature of the topics alluded to; but the subject of meditation seems to be, the policy to be pursued by a govern-

ment short of supplies; and the conclusion has a direct connexion with the subject of this fragment.

The first note stands thus, *literatim*:

"The bring. y^e^ K. low by pov. and empt. cof."

The next indicates an apprehension of serious troubles:

"The revolt or troub. first in Sco. for till that be no dang. of Eng. discont. in dowt of a warre frō thence."

There then follow several notes relating to the greatness of particular persons or bodies — the Lower House of Parliament among others — but without any thing to explain the connexion.

Further on there are notes of commonwealth reforms; such as "limiting all jurisdictions: more regular;" "new laws to be compounded and collected; lawgiver perpetuus princeps:" (measures, both, on which Bacon was always harping:) "restoration of the Church to the true limits of authority since H. 8^ths^ confusion;" all subjects fitted to occupy Parliament and divert attention from matters of dispute between Commons and King. Then a few memoranda as to choice of persons. After which an allusion to this paper with which we are at present concerned:

"Finishing my treat. of y^e^ Great. of Br. w^th^ aspect ad pol."

And finally the two following notes, which appear to point at the conclusion:

"The fairest, without dis. or per. is the gener. perswad. to K. and peop. and cours. of infusing every whear the foundat. in this Ile of a mon. in y^e^ West as an apt seat state people for it. Cyvilyzing Ireland, furder coloniz. y^e^ wild of Scotl. Annexing y^e^ Lowe Countries.

"Yf anything be questio. touch. Pol. to be turned upon y^e^ ampliation of a mon. in the Royalty."

After which the note-book passes to other subjects.

Of course all inferences drawn from memoranda like these, which were not intended to explain themselves to any one but the writer, are uncertain; but we have other evidence to show that Bacon considered it an essential point of policy to provide the people and the House of Commons with some matter of interest or ambition which they might pursue *with* the government, and not against it; and that, on that principle, a legitimate occasion for taking part in a foreign quarrel was at all times

regarded by him as a fortunate accident. And as we know that the pacific policy of James and his preference of embassies to armies was at the time unpopular, it may well be conceived that a policy aiming apparently and avowedly at the aggrandisement of Great Britain among the nations (the second in dignity, according to Bacon's own estimate, *Nov. Org.* i. 129., among the ambitions of man) would, if commenced in 1608, have carried popular sympathy with it and entirely altered the relation between Crown and people. Bacon had seen a few years before, in the Parliament which met after the Gunpowder Plot, how rapidly disputes and discontents could be forgotten under the excitement of a common passion; and the same thing was seen not less conspicuously a few years after, when upon the determination to raise an army for the recovery of the Palatinate, a *Benevolence* was levied, without parliamentary authority and with universal applause; and a double subsidy was voted with unusual alacrity, without delays questions or conditions, by the Parliament which met immediately after.

This then I take to have been the "policy" with a view to which he proposed in the summer of 1608 to go on with the treatise of the Greatness of Britain, which it seems he had then begun. How much further he proceeded with it, it is impossible to know: for the manuscript which has been preserved is in a disjointed state, and any number of leaves may have been lost either from the middle or the end without leaving evidence of the fact. I suppose however that he never finished it; finding that the courses taken by the government, then chiefly guided by the Earl of Salisbury, were directly at variance and incompatible with it, and so the chance gone. And he afterwards turned it into a general treatise on the True Greatness of Kingdoms and Estates; the Latin version of which is given in the *De Augmentis Scientiarum* (vol. i. p. 793.) as a specimen of a treatise *De proferendis finibus imperii*, and the English will be found (vol. vi. p. 444.) among the Essays.

This fragment was first published by Stephens (second collection, 1634, p. 193.) from a manuscript then belonging to Lord Oxford, now in the British Museum: Harl. MSS. 7021. fo. 25.; —the only copy I have met with or heard of. It is a transcript in two different hands, which seem to have been at work at the same time,—if one may infer as much from the fact that

though the first leaves off in the middle of the page the second begins at the top of a fresh sheet. All of it however, except a few leaves at the end, has been revised and corrected by Bacon himself; and on the blank page of what has once been the last sheet of the bundle, is written "Compositions," in Bacon's hand. There can be no doubt therefore as to the genuineness of it; and indeed it is one of the best and most careful of his writings, as far as it goes.

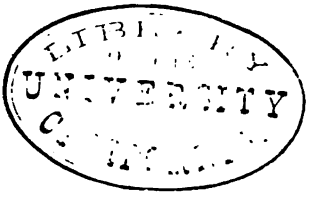
OF THE

TRUE GREATNESS

OF

THE KINGDOM OF BRITAIN.

FORTUNATOS NIMIUM, SUA SI BONA NORINT.



OF THE

TRUE GREATNESS

OF

THE KINGDOM OF BRITAIN.

TO KING JAMES.

THE greatness of kingdoms and dominions in bulk and territory doth fall under measure and demonstration that cannot err: but the just measure and estimate of the forces and power of an estate is a matter than the which there is nothing among civil affairs more subject to error, nor that error more subject to perilous consequence. For hence may proceed many inconsiderate attempts and insolent provocations in states that have too high an imagination of their own forces: and hence may proceed, on the other side, a toleration of many grievances and indignities, and a loss of many fair opportunities, in states that are not sensible enough of their own strength. Therefore, that it may the better appear what greatness your majesty hath obtained of God, and what greatness this island hath obtained by you, and what greatness it is, that by the gracious pleasure of Almighty God you shall leave and transmit to your children and generations as the first founder; I have thought good, as far as I can comprehend, to make a true survey and representation of the greatness of this your kingdom of Britain; being for mine own part persuaded, that the supposed prediction, *Video solem orientem in occidente,* may be no less true a vision applied to Britain, than to any other kingdom of Europe; and being out of doubt that none of the great monarchies which in the memory of times have risen in the habitable world, had so fair seeds and beginnings as hath this your estate and kingdom;

whatsoever the event shall be, which must depend upon the dispensation of God's will and providence, and his blessings upon your descendents. And because I have no purpose vainly or assentatorily to represent this greatness as in water, which shews things bigger than they are, but rather as by an instrument of art, helping the sense to take a true magnitude and dimension: therefore I will use no hidden order, which is fitter for insinuations than sound proofs, but a clear and open order: first by confuting the errors or rather correcting the excesses of certain immoderate opinions, which ascribe too much to some points of greatness which are not so essential, and by reducing those points to a true value and estimation: then by propounding and confirming those other points of greatness which are more solid and principal, though in popular discourse less observed: and incidently by making a brief application, in both these parts, of the general principles and positions of policy unto the state and condition of these your kingdoms.

Of these the former part will branch itself into these articles:

First, *That in the measuring or balancing of greatness, there is commonly too much ascribed to largeness of territory.*

Secondly, *That there is too much ascribed to treasure or riches.*

Thirdly, *That there is too much ascribed to the fruitfulness of the soil, or affluence of commodities.*

And fourthly; *That there is too much ascribed to the strength and fortifications of towns or holds.*

The latter will fall into this distribution:

First, *That true greatness doth require a fit situation*[1] *of the place or region.*

Secondly, *That true greatness consisteth essentially in population and breed of men.*

Thirdly, *That it consisteth also in the valour and military*[2] *disposition of the people it breedeth: and in this, that they make profession of arms.*

Fourthly, *That it consisteth in this point, that every common*

[1] Originally "consisteth much in the natural and fit situation," &c., corrected in Bacon's hand.

[2] "Militarie" in MS.: a third instance in correction of my note, Vol. VI. p. 27. Compare pp. 587. 591. of that volume, and pp. 53. 58. of this. It would seem that Bacon used the form *military* in his earlier works, and *militar* in his later.

subject by the poll be fit to make a soldier, and not only certain conditions or degrees of men.

Fifthly, *That it consisteth in the temper of the government fit to keep subjects in heart and courage, and not to keep them in the condition of servile vassals.*

And sixthly, *That it consisteth in the commandment of the sea.*

And let no man so much forget the subject propounded, as to find strange that here is no mention of religion, laws, policy. For we speak of that which is proper to the amplitude and growth of states, and not of that which is common to their preservation, happiness, and all other points of well-being.

First, therefore, touching largeness of territories, the true greatness of kingdoms upon earth is not without some analogy with the kingdom of heaven, as our Saviour describes it: which he doth resemble, not to any great *kernel* or *nut*, but to one of the least *grains*, but yet such a one as hath a property to grow and spread. For as for large countries and multitude of provinces, they are many times rather matters of burden than of strength, as may manifestly appear both by reason and example. By reason thus: There be two manners of securing of large territories: the one by the natural arms of every province; and the other by the protecting arms of the principal estate, in which case commonly the provincials are held disarmed. So are there two dangers incident unto every estate; foreign invasion, and inward rebellion. Now such is the nature of things, that those two remedies of estate do fall respectively into these two dangers, in case of remote provinces. For if such an estate rest upon the natural arms of the provinces, it is sure to be subject to rebellion or revolt; if upon protecting arms, it is sure to be weak against invasion: neither can this be avoided. Now for examples proving the weakness of states possessed of large territories, I will use only two, eminent and selected. The first shall be of the kingdom of Persia, which extended from Egypt inclusive unto Bactria and the borders of the East India, and yet nevertheless was over-run and conquered in the space of seven years, by a nation not much bigger than this isle of Britain, and newly grown into name, having been utterly obscure till the time of Philip the son of Amyntas. Neither was this effected by any rare or heroical prowess in the con-

queror, as is vulgarly conceived (for that Alexander the Great goeth now for one of the wonders of the world); for those that have made a judgment grounded upon reason of estate, do find that conceit to be merely popular. For so Livy pronounceth of him, *Nihil aliud quam bene ausus vana contemnere.* Wherein he judgeth of *vastness of territory* as a vanity that may astonish a weak mind, but no ways trouble a sound resolution. And those that are conversant attentively in the histories of those times, shall find that this purchase which Alexander made and compassed was offered by fortune twice before to others, though by accident they went not thorough with it; namely, to Agesilaus, and Jason of Thessaly. For Agesilaus, after he had made himself master of most of the low provinces of Asia, and had both design and commission to invade the higher countries, was diverted and called home upon a war excited against his country by the states of Athens and Thebes, being incensed by their orators and counsellors, which were bribed and corrupted from Persia, as Agesilaus himself avouched pleasantly, when he said That an hundred thousand archers of the kings of Persia had driven him home: understanding it, because an archer was the stamp upon the Persian coin of gold. And Jason of Thessaly, being a man born to no greatness, but one that made a fortune of himself, and had obtained by his own vivacity of spirit, joined with the opportunities of time, a great army compounded of voluntaries and adventurers, to the terror of all Græcia, that continually expected where that cloud would fall, disclosed himself in the end, that his design was for an expedition into Persia, (the same which Alexander not many years after achieved,) wherein he was interrupted by a private conspiracy against his life, which took effect. So that it appeareth as was said, that it was not any miracle of accident that raised the Macedonian monarchy, but only the weak composition of that vast state of Persia, which was prepared for a prey to the first resolute invader. The second example that I will produce, is of the Roman empire, which had received no diminution in territory, though great in virtue and forces, till the time of Jovianus. For so it was alleged by such as opposed themselves to the rendering of Nisibis upon the dishonourable retreat of the Roman army out of Persia. At which time it was avouched, that the Romans by the space of eight hundred years had never before that day made any cession or renun-

ciation to any part of their territory, whereof they had once had a constant and quiet possession. And yet nevertheless, immediately after the short reign of Jovianus, and towards the end of the joint-reign of Valentinianus and Valens, which were his immediate successors, and much more in the times succeeding, the Roman empire, notwithstanding the magnitude thereof, became no better than a carcase, whereupon all the vultures and birds of prey of the world did seize and ravine for many ages, for a perpetual monument of the essential difference between the scale of miles and the scale of forces. And therefore upon these reasons and examples we may safely conclude, that largeness of territory is so far from being a thing inseparable from greatness of power, as it is many times contrariant and incompatible with the same. But to make a reduction of that error to a truth, it will stand thus, That then greatness of territory addeth strength, when it hath these four conditions:

First, *That the territories be compacted, and not dispersed.*

Secondly, *That the region which is the heart and seat of the state, be sufficient to support those parts which are but provinces and additions.*

Thirdly, *That the arms or martial virtue of the state be in some degree answerable to the greatness of dominion.*

And lastly, *That no part or province of the state be utterly unprofitable, but do confer some use or service to the state.*

The first of these is manifestly true, and scarcely needeth any explication. For if there be a state that consisteth of scattered points instead of lines, and slender lines instead of latitudes, it can never be solid, and in the solid figure is strength. But what speak we of mathematical principles? The reason of state is evident, that if the parts of an estate be disjoined and remote, and so be interrupted with the provinces of another sovereignty, they cannot possibly have ready succours in case of invasion, nor ready suppression in case of rebellion, nor ready recovery in case of loss or alienation by either of both means. And therefore we see what an endless work the King of Spain hath had to recover the Low Countries, although it were to him patrimony and not purchase; and that chiefly in regard of the great distance. So we see that our nation kept Calais a hundred years' space after it lost the rest of France, in regard of the near situation; and yet in the end

they that were nearer carried it, and surprise over-ran succours. Therefore Titus Quintius made a good comparison of the state of the Achaians to a tortoise, which is safe when it is retired within the shell, but if any part be put forth, then the part exposed endangereth all the rest. For so it is with states that have provinces dispersed, the defence whereof doth commonly consume and decay and sometimes ruin the rest of the estate. And so likewise we may observe, that all the great monarchies, the Persians, the Romans, (and the like of the Turks,) they had not any provinces to the which they needed to demand access through the country of another: neither had they any long races or narrow angles of territory, which were environed or clasped in with foreign states; but their dominions were continued and entire, and had thickness and squareness in their orb or contents. But these things are without contradiction.

For the second, concerning the proportion between the principal region and those which are but secondary, there must evermore distinction be made between the *body* or *stem* of the tree, and the *boughs* and *branches*. For if the top be overgreat and the stalk too slender, there can be no strength. Now the body is to be accounted so much of an estate as is not separated or distinguished with any mark of *foreigners*, but is united specially with the bond of naturalization. And therefore we see that when the state of Rome grew great, they were enforced to naturalize the Latins or Italians, because the Roman *stem* could not bear the provinces and Italy both as *branches:* and the like they were content after to do to most of the Gauls. So on the contrary part, we see in the state of Lacedæmon, which was nice in that point, and would not admit their confederates to be incorporate with them, but rested upon the natural-born subjects of Sparta, how that a small time after they had embraced a larger empire, they were presently surcharged, in respect to the slenderness of the *stem:* for so in the defection of the Thebans and the rest against them, one of the principal revolters spake most aptly and with great efficacy in the assembly of the associates, telling them that the State of Sparta was like a river, which after that it had run a great way, and taken other rivers and streams into it, ran strong and mighty, but about the head and fountain of it was shallow and weak; and therefore advised them to assail and invade the

main of Sparta, knowing they should there find weak resistance either of towns or in the field: of towns, because upon confidence of their greatness they fortified not upon the main; in the field, because their people was exhaust by garrisons and services far off. Which counsel proved sound, to the astonishment of all Græcia at that time.

For the third, concerning the proportion of the military forces of a state to the amplitude of empire, it cannot be better demonstrated than by the two first examples which we produced of the weakness of large territory, if they be compared within themselves according to difference of time. For Persia at a time was strengthened with large territory, and at another time weakened; and so was Rome. For while they flourished in arms, the largeness of territory was a strength to them, and added forces, added treasures, added reputation: but when they decayed in arms, then greatness became a burden. For their protecting forces did corrupt, supplant, and enervate the natural and proper forces of all their provinces, which relied and depended upon the succours and directions of the state above. And when that also waxed impotent and slothful, then the whole state laboured with her own magnitude, and in the end fell with her own weight. And that, no question, was the reason of the strange inundations of people which both from the east and north-west overwhelmed the Roman empire in one age of the world, which a man upon the sudden would attribute to some constellation or fatal revolution of time, being indeed nothing else but the declination of the Roman empire, which having effeminated and made vile the natural strength of the provinces, and not being able to supply it by the strength imperial and sovereign, did, as a lure cast abroad, invite and entice all the nations adjacent, to make their fortunes upon her decays. And by the same reason there cannot but ensue a dissolution to the state of the Turk in regard of the largeness of empire, whensoever their martial virtue and discipline shall be further relaxed, whereof the time seemeth to approach. For certainly like as great stature in a natural body is some advantage in youth, but is but burden in age; so it is with great territory, which when a state beginneth to decline, doth make it stoop and buckle so much the faster.

For the fourth and last, it is true, that there is to be required and expected, as in the parts of a body, so in the members of a

state, rather propriety of service than equality of benefit. Some provinces are more wealthy, some more populous, and some more warlike; some situate aptly for the excluding or expulsing of foreigners, and some for the annoying and bridling of suspected and tumultuous subjects; some are profitable in present, and some may be converted and improved to profit by plantations and good policy. And therefore true consideration of estate can hardly find what to reject, in matter of territory, in any empire, except it be some glorious acquests obtained sometime in the bravery of wars, which cannot be kept without excessive charge and trouble; of which kind were the purchases of King Henry VIII. that of Tournay and that of Bulloigne; and of the same kind are infinite other the like examples almost in every war, which for the most part upon treaties of peace are restored again.[1]

Thus have we now defined where the largeness of territory addeth true greatness, and where not. The application of these positions unto the particular or supposition of this your majesty's kingdom of Britain, requireth few words. For as I professed in the beginning, I mean not to blazon or amplify, but only to observe and express matter.

First, Your majesty's dominion and empire comprehendeth all the islands of the north-west ocean, where it is open, until you come to the imbarred or frozen sea towards Iceland; in all which tract it hath no intermixture or interposition of any foreign land, but only of the sea, whereof you are also absolutely master.

Secondly, The quantity and content of these countries is far greater than have been the principal or fundamental regions of the greatest monarchies, greater than Persia proper, greater than Macedon, greater than Italy. So as here is potentially

[1] In the manuscript the sentence went on thus; but a line has been drawn across the words. "Or if they be too great to be yielded up or abandoned, then it hath been the policy of the wisest estates, in case where they had impatronized themselves of any province that did border and lie open to the continual infestation of an enemy that was their match in power, rather to erect and place some beneficiary prince that might have dependence upon them, than to hold it and make it good by their own forces: as we find the state of Rome did by the kingdom of Armenia which fronted upon the Parthians, and the counsel of the Turk did by the provinces of Transilvania, Valachia, and Moldavia, that fronted upon the Christians, though that policy hath not sorted very prosperous unto them of late years."

The case of these Turkish provinces, which had recently revolted under Sigismund, Prince of Transylvania, was adduced by Bacon in his speech on the Naturalisation of the Scots as an instance of the liability of all unions to break which are not cemented by naturalization.

body and *stem* enough for Nabuchodonosor's tree, if God should have so ordained.

Thirdly, The prowess and valour of your subjects is able to master and wield far more territory than falleth to their lot. But that followeth to be spoken of in the proper place.

And lastly, it must be confessed that whatsoever part of your countries and regions shall be counted the meanest, yet is not inferior to those countries and regions, the people whereof some ages since over-ran the world. We see furder by the uniting of the continent of this island, and the shutting up of the *postern* (as it was not unfitly termed), all entrance of foreigners is excluded; and we see again, that by the fit situation and configuration of the north of Scotland toward the north of Ireland, and the reputation commodity and terror thereof, what good effects have ensued for the better quieting of the troubles of Ireland. And so we conclude this first branch touching largeness of territory.

THE second article was,

That there is too much ascribed to treasure or riches in the balancing of greatness.

Wherein no man can be ignorant of the idolatry that is generally committed in these degenerate times to money, as if it could do all things public and private. But leaving popular errors, this is likewise to be examined by reason and examples, and such reason as is no new conceit or invention, but hath formerly been discerned by the sounder sort of judgments. For we see that Solon, who was no contemplative wise man, but a statesman and a lawgiver, used a memorable censure to Crœsus, when he showed him great treasures and store of gold and silver that he had gathered, telling him, that whensoever another should come that had better *iron* than he, he would be master of all his *gold* and *silver*. Neither is the authority of Machiavel to be despised, specially in a matter whereof he saw the evident experience before his eyes in his own times and country, who derideth the received and current opinion and principle of estate taken first from a speech of Mutianus the lieutenant of Vespasian, *That money was the sinews of war;* affirming that it is a mockery, and that there are no other true *sinews of war*, but the *sinews and muscles of men's arms:* and that there was never any

war, wherein the more valiant people had to deal with the more wealthy, but that the war, if it were well conducted, did nourish and pay itself. And had he not reason so to think, when he saw a needy and ill-provided army of the French, (though needy rather by negligence than want of means, as the French manner oftentimes is,) make their passage only by the reputation of their swords by their sides undrawn, through the whole length of Italy (at that time abounding in wealth after a long peace), and that without resistance, and to seize and leave what countries and places it pleased them? But it was not the experience of that time alone, but the records of all times that do concur to falsify that conceit, that wars are decided not by the sharpest sword but by the greatest purse. And that very text or saying of Mutianus which was the original of this opinion, is misvouched, for his speech was, *Pecuniæ sunt nervi belli civilis;* which is true, for that civil wars cannot be between people of differing valour; and again because in them men are as oft bought as vanquished. But in case of foreign wars, you shall scarcely find any of the great monarchies of the world, but have had their foundations in poverty and contemptible beginnings, being in that point also conform to the heavenly kingdom, of which it is pronounced, *Regnum Dei non venit cum observatione.* Persia, a mountainous country, and a poor people in comparison of the Medes and other provinces which they subdued. The state of Sparta, a state wherein poverty was enacted by law and ordinance; all use of gold and silver and rich furniture being interdicted. The state of Macedonia, a state mercenary and ignoble until the time of Philip. The state of Rome, a state that had poor and pastoral beginnings. The state of the Turks, which hath been since the terror of the world, founded upon a transmigration of some bands of Sarmatian Scythes, that descended in a vagabond manner upon the province that is now termed Turcomannia; out of the remnants whereof, after great variety of fortune, sprang the Othoman family. But never was any position of estate so visibly and substantially confirmed, as this touching the pre-eminence, yea and predominancy, of valour above treasure was, by the two descents and inundations of necessitous and indigent people, the one from the East, and the other from the West; that of the Arabians or Saracens, and that of the Goths, Vandals, and the

rest: who, as if they had been the true inheritors of the Roman empire, then dying, or at least grown impotent and aged, entered upon Egypt, Asia, Græcia, Afric, Spain, France; coming to these nations, not as to a prey, but as to a patrimony; not returning with spoil, but seating and planting themselves in a number of provinces, which continue their progeny and bear their names till this day. And all these men had no other wealth but their adventures, nor no other title but their swords, nor no other press but their poverty. For it was not with most of those people as it is in countries reduced to a regular civility, that no man almost marrieth except he see he have means to live; but population went on, howsoever sustentation followed; and taught by necessity, as some writers report, when they found themselves surcharged with people they divided their inhabitants into three parts; and one third, as the lot fell, was sent abroad and left to their adventures. Neither is the reason much unlike (though the effect hath not followed in regard of a special diversion) in the nation of the Swisses, inhabiting a country which, in regard of the mountainous situation and the popular estate, doth generate faster than it can sustain. In which people, it well appeared what an authority *iron* hath over *gold* at the battle of Granson, at what time one of the principal jewels of Burgundy was sold for twelve pence by a poor Swiss, that knew no more a precious stone than did Æsop's cock. And although this people have made no plantations with their arms, yet we see the reputation of them such, as not only their forces have been employed and waged, but their alliance sought and purchased, by the greatest kings and states of Europe. So as though fortune, as it fares sometimes with princes to their servants, hath denied them a grant of lands, yet she hath granted them liberal pensions, which are made memorable and renowned to all posterity by the event which ensued to Lewis the twelfth; who being pressed uncivilly by message from them for the inhancing their pensions, entered into choler and broke out into these words, *What! will these villains of the mountains put a tax upon me?* which words cost him his duchy of Milan, and utterly ruined his affairs in Italy. Neither were it indeed possible at this day, that that nation should subsist without descents and impressions upon their neighbours, were it not for the great utterance of people which

they make into the services of foreign princes and estates, thereby discharging not only number, but in that number such spirits as are most stirring and turbulent.

And therefore we may conclude, that as largeness of territory, severed from military virtue, is but a burden; so that treasure and riches, severed from the same, is but a prey. It resteth therefore to make a reduction of this error also unto a truth by distinction and limitation, which will be in this manner:

Treasure and moneys do then add true greatness and strength to a state, when they are accompanied with these three conditions:

First, (the same condition which hath been annexed to largeness of territory,) that is, *that they be joined with martial prowess and valour.*

Secondly, *That treasure doth then advance greatness, when it is rather in mediocrity than in great abundance. And again better when some part of the state is poor, than when all parts of it are rich.*

And lastly, *That treasure in a state is more or less serviceable, as the hands are in which the wealth chiefly resteth.*

For the first of these, it is a thing that cannot be denied, that in equality of valour the better purse is an advantage. For like as in wrestling between man and man, if there be a great overmatch in strength, it is to little purpose though one have the better breath; but, if the strength be near equal, then he that is shorter winded will (if the wager consist of many falls) in the end have the worst: so it is in the wars, if it be a match between a valiant people and a cowardly, the advantage of treasure will not serve; but if they be near in valour, then the better monied state will be the better able to continue the war, and so in the end to prevail. But if any man think that money can make those provisions at the first encounters, that no difference of valour can countervail, let him look back but into those examples which have been brought, and he must confess that all those furnitures whatsoever are but shews and mummeries, and cannot shrowd fear against resolution. For there shall he find companies armed with armour of proof taken out of the stately armouries of kings who spared no cost, overthrown by men armed by private bargain and chance as they

could get it: there shall he find armies appointed with horses bred of purpose and in choice races, chariots of war, elephants, and the like terrors, mastered by armies meanly appointed. So of towns strongly fortified, basely yielded, and the like; all being but sheep in a lion's skin, where valour faileth.

For the second point. That competency of treasure is better than surfeit, is a matter of common place or ordinary discourse; in regard that excess of riches, neither in public nor private, ever hath any good effects; but maketh men either slothful and effeminate, and so no enterprisers, or insolent and arrogant, and so overgreat embracers, but most generally cowardly and fearful to lose, according to the adage, *Timidus Plutus;* so as this needeth no further speech. But a part of that assertion requireth a more deep consideration, being a matter not so familiar, but yet most assuredly true. For it is necessary in a state that shall grow and inlarge, that there be that composition which the poet speaketh of, *Multis utile bellum;* an ill condition of a state (no question) if it be meant of a civil war, as it was spoken; but a condition proper to a state that shall increase, if it be taken of a foreign war. For except there be a spur in the state that shall excite and prick them on to wars, they will but keep their own, and seek no further. And in all experience and stories you shall find but three things that prepare and dispose an estate to war: *the ambition of governors; a state of soldiers professed;* and *the hard means to live of many subjects.* Whereof the last is the most forcible and the most constant. And this is the true reason of that event which we observed and rehearsed before, that most of the great kingdoms of the world have sprung out of hardness and scarceness of means, as the strongest herbs out of the barrenest soils.[1]

For the third point, concerning the placing and distributing of treasure in a state, the position is simple; that then treasure is greatest strength to a state, when it is so disposed, as it is readiest and easiest to come by for public service and use: which one position doth infer three conclusions.

First, that there be quantity sufficient of treasure as well in the treasury of the crown or state, as in the purse of the private subject.

[1] Here the manuscript breaks off in the middle of the page. The next paragraph begins at the top of a fresh sheet in another hand. But a catch-word in the hand of the second transcriber shows that it was meant to join on.

Secondly, that the wealth of the subject be rather in many hands than in few.

And thirdly, that it be in those hands, where there is likest to be greatest sparing and increase, and not in those hands wherein there useth to be greatest expense and consumption.

For it is not the abundance of treasure in the subject's hands that can make sudden supply of the want of a state; because reason tells us, and experience both, that private persons have least will to contribute when they have most cause; for when there is noise or expectation of wars, then is always the deadest times for monies, in regard every man restraineth and holdeth fast his means for his own comfort and succour, according as Salomon saith, *The riches of a man are as a strong hold in his own imagination:* and therefore we see by infinite examples, and none more memorable than that of Constantinus the last Emperor of the Greeks, and the citizens of Constantinople, that subjects do often choose rather to be frugal dispensers for their enemies than liberal lenders to their princes. Again, wheresoever the wealth of the subject is engrossed into few hands, it is not possible it should be so respondent and yielding to payments and contributions for the public; both because the true estimation or assessment of great wealth is more obscure and uncertain; and because the burden seemeth lighter when the charge lieth upon many hands; and further, because the same greatness of wealth is for the most part not collected and obtained without sucking it from many, according to the received similitude of the spleen, which never swelleth but when the rest of the body pineth and abateth. And lastly, it cannot be that any wealth should leave a second overplus for the public, that doth not first leave an overplus to the private stock of him that gathers it; and therefore nothing is more certain, than that those states are least able to aid and defray great charges for wars, or other public disbursements, whose wealth resteth chiefly in the hands of the nobility and gentlemen. For what by reason of their magnificence and waste in expence, and what by reason of their desire to advance and make great their own families, and again upon the coincidence of the former reason, because they are always the fewest; small is the help, as to payments or charges, that can be levied or expected from them towards the occasions of a state. Contrary it is of such states whose wealth resteth in the hands of merchants, burghers,

tradesmen, freeholders, farmers in the country, and the like; whereof we have a most evident and present example before our eyes, in our neighbours of the Low-Countries, who could never have endured and continued so inestimable and insupportable charges, either by their natural frugality or by their mechanical industry, were it not also that there was a concurrence in them of this last reason, which is, that their wealth was dispersed in many hands, and not ingrossed into few; and those hands were not much of the nobility, but most and generally of inferior conditions.

To make application of this part concerning treasure to your majesty's kingdoms:

First, I suppose I cannot err, that as to the endowments of your crown, there is not any crown of Europe, that hath so great a proportion of demesne and land revenue. Again, he that shall look into your prerogative shall find it to have as many streams to feed your treasury, as the prerogative of any of the said kings, and yet without oppression or taxing of your people. For they be things unknown in many other states, that all rich mines should be yours, though in the soil of your subjects; that all wardships should be yours, where a tenure in chief is, of lands held of your subjects; that all confiscations and escheats of treason should be yours, though the tenure be of the subject; that all actions popular, and the fines and casualties thereupon, may be informed in your name, and should be due unto you, and a moiety at the least where the subject himself informs. And further, he that shall look into your revenues at the ports of the sea, your revenues in courts of justice, and for the stirring of your seals, the revenues upon your clergy, and the rest, will conclude that the law of England studied how to make a rich crown, and yet without levies upon your subject. For merchandizing, it is true it was ever by the kings of this realm despised, as a thing ignoble and indign for a king, though it is manifest, the situation and commodities of this island considered, it is infinite what your majesty mought raise, if you would do as a King of Portugal doth, or a Duke of Florence, in matter of merchandise. As for the wealth of the subject[1] * * * *

[1] Here the MS. stops again before the bottom of the page. The next page, which was left blank, has at one time been the outside of the bundle, for it is docqueted in

To proceed to the articles affirmative. The first was,

That the true greatness of an estate consisteth in the natural and fit situation of the region or place.

Wherein I mean nothing superstitiously touching the fortunes or fatal destiny of any places, nor philosophically touching their configuration with the superior globe. But I understand proprieties and respects merely civil, and according to the nature of human actions, and the true considerations of estate. Out of which duly weighed, there doth arise a triple distribution of the fitness of a region for a great monarchy. First, that it be of hard access. Secondly, that it be seated in no extreme angle, but commodiously in the midst of many regions. And thirdly, that it be maritime, or at the least upon great navigable rivers; and be not inland or mediterrane. And that these are not conceits, but notes of event, it appeareth manifestly, that all great monarchies and states have been seated in such manner, as, if you would place them again, observing these three points which I have mentioned, you cannot place them better; which shews the pre-eminence of nature, unto which human industry or accident cannot be equal, specially in any continuance of time. Nay, if a man look into these things more attentively, he shall see divers of these seats of monarchies, how fortune hath hovered still about the places, coming and going only in regard of the fixed reason of the conveniency of the place, which is immutable. And therefore first we see the excellent situation of Egypt, which seemeth to have been the most ancient monarchy, how conveniently it stands upon a neck of land commanding both seas on either side, and embracing, as it were with two arms, Asia and Afric, besides the benefit of the famous river of Nilus. And therefore we see what hath been the fortune of that country, there having been two mighty returns of fortune, though at great distance of time; the one in the times of Sesostris, and the other in the empire of the Mamalukes, besides the middle greatness of the kingdom of the Ptolomies, and of the greatness of the Caliphs and Sultans in the latter times. And this region, we see like-

Bacon's own hand, "Compositions." The rest is in the hand of the first transcriber, though not so fairly written. It bears no traces of correction or revision; nor are there any marks to show whether all that was done is there. It will be observed that the last two of the negative articles are not touched on. But any number of sheets may have dropped out here without detection.

wise, is of strait and defensible access, being commonly called of the Romans, *Claustra Ægypti.*[1] Consider in like manner the situation of Babylon, being planted most strongly in regard of lakes and overflowing grounds between the two great navigable rivers of Euphrates and Tigris, and in the very heart of the world, having regard to the four *cardines* of east and west and northern and southern regions. And therefore we see that although the sovereignty alter, yet the seat still of the monarchy remains in that place. For after the monarchies of the kings of Assyria, which were natural kings of that place[2], yet when the foreign kings of Persia came in, the seat remained. For although the mansion of the persons of the kings of Persia were sometimes at Susa, and sometimes at Ecbatana, which were termed their winter and their summer parlours, because of the mildness of the air in the one, and the freshness in the other; yet the city of estate continued to be Babylon. Therefore we see that Alexander the Great, according to the advice of Calanus the Indian, that shewed him a bladder, which if it were borne down at one end would rise at the other, and therefore wished him to keep himself in the middle of his empire, chose accordingly Babylon for his seat, and died there. And afterwards likewise in the family of Seleucus and his descendents, Kings of the East, although divers of them, for their own glory, were founders of cities of their own names, as Antiochia, Seleucia, and divers others, (which they sought by all means to raise and adorn,) yet the greatness still remained according unto nature with the ancient seat. Nay, further on, the same remained during the greatness of the kings of Parthia, as appeareth by the verse of Lucan, who wrote in Nero's time.

Cumque superba staret Babylon spolianda trophæis.

And after that again, it obtained the seat of the highest Caliph or successors of Mahomet. And at this day, that which they call Bagdat, which joins to the ruins of the other, continueth one of the greatest satrapies of the Levant. So again Persia, being a country imbarred with mountains, open to the sea, and in the middle of the world, we see hath had three memorable revolutions of great monarchies. The first in the time of

[1] Opposite this sentence is written in the margin in the transcriber's hand, "M[d] to add the reasons of the three properties."

[2] So MS. I suspect that some words have dropped out here.

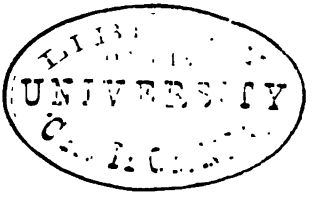
Cyrus; the second in the time of the new Artaxerxes, who raised himself in the reign of Alexander Severus, Emperor of Rome; and now of late memory, in Ismael the Sophy, whose descendents continue in empire and competition with the Turks to this day.

So again Constantinople, being one of the most excellentest seats of the world, in the confines of Europe and Asia.[1]

* * * * * *

[1] Here the MS. stops again, at the bottom of the page; but without any mark of ending. The other side of the leaf is indeed left blank; but the rest of the original draught, if there was more, may have been in the hands of another transcriber.

COLOURS OF GOOD AND EVIL.



PREFACE.

THE fragment entitled *Of the Colours of Good and Evil* (the beginning of a collection of colourable arguments on questions of good and evil, with answers to them,) appears in a more perfect shape, though still a fragment, in the sixth book of the *De Augmentis Scientiarum;* see Vol. I. p. 674. As it stands here, it formed part of Bacon's earliest publication; being printed in the same volume with the Essays and *Meditationes Sacræ* (1597), in the title of which it is called "Places of persuasion and dissuasion;" and was probably composed not long before.

In a bundle of manuscripts in the British Museum (of which a more particular account will be found, under the title of *Promus of Formularies and Elegancies*, further on in this volume), written in Bacon's hand and apparently about the years 1595 and 1596, there is a considerable collection of these "colours;" but being set down without the explanations, and with only here and there a note to suggest the answer, they are valuable only as an example of his manner of working and of the activity of his industry. There are seventy or eighty altogether. The following are on a separate sheet, and may serve as a specimen of the least naked of them.

Semblances or popularities of good and evill, with their redargutions; for Deliberacions.

Cujus contrarium malum bonum; cujus bonum malum.

Non tenet in iis rebus quarum vis in temperamento et mensurâ sita est.

Dum vitant stulti vitia in contraria currunt.

Media via nulla est quæ nec amicos parit nec inimicos tollit.

Solon's law that in states every man should declare himself of one faction. Neutralitye.

Utinam esses calidus aut frigidus: sed quoniam tepidus es eveniet ut te expuam ex ore meo.

Dixerunt fatui medium tenuere beati.

Cujus origo occasio bona, bonum: cujus mala malum.

Non tenet in iis malis quæ vel mentem informant, vel affectum corrigunt, sive resipiscentiam inducendo sive necessitatem, nec etiam in fortuitis.

No man gathereth grapes of thornes nor figges of thistells.

The nature of everything is best consydered in the seed.

Primum mobile turnes about all the rest of the orbes.

A good or yll foundacon.

Ex malis moribus bonæ leges.

παθήματα μαθήματα.

When things are at the periode of yll they turn agayne.

Many effects like the serpent that devoureth her moother, so they destroy their first cause, as inopia, luxuria &c.

The fashon of D. Hect. to the dames of Lond. your way is to be sicker.

Usque adeo latet utilitas.

Aliquisque malo fuit usus in illo.

Quod ad bonum finem dirigitur bonum, quod ad malum malum.[1]

* * * * * *

The sheet on which this is written, and of which the rest is left blank, is docqueted in Bacon's hand, but apparently at a later period, *Philologue, Colors of Good and Evill.*

From the character of these "redargutions," or hints for redargution, (and the rest are of the same kind, only rather less full,) compared with the more finished expositions which will be found in the fragment which follows, there can be little doubt that they are of earlier date. I suppose that Bacon shortly after selected a few of the Colours which he had thus gathered together, and finished them according to the form of the intended treatise.

The fragment was first *published*, and probably first printed, along with the first edition of the *Essays*; for it begins on the same sheet which contains the last of the *Meditationes Sacræ*,

[1] Harl. MSS. 7017. fo. 128.

of which the first begins on the same sheet which contains the last essay. A copy of it appears however to have been sent separately (and probably in MS.) to Lord Mountjoy, to whom it was originally dedicated, or meant to be dedicated; for a manuscript volume in the library of Queen's College, Oxford, consisting of old copies of Bacon's early letters (the same apparently, or a copy of the same, from which Dr. Rawley printed his *supplementary* collection in the *Resuscitatio*), contains a letter to Lord Mountjoy, evidently referring to this fragment, in some form of it. In the common editions of Bacon's works this letter is stated to be "from the *original draught* in the library of Queen's College" &c. But this is a mistake. The copies in the volume to which I refer have been taken for original draughts because the copyist has been hasty and careless and had often to correct himself as he went on. But the hand is certainly not Bacon's; and if the order in which the letters succeed each other be examined, it will appear that they could not possibly be original draughts.

The letter has no date, and runs thus:

"My very good Lord,

Finding by my last going to my lodge at Twicnam and tossing over my papers, somewhat that I thought mought like you, I had neither leisure to perfect them, nor the patience to expect leisure. So impatient was I to make demonstration of my honourable love towards you and to increase your good love towards me. And I would not have your Lordship conceive, though it be my manner and rule to keep state in contemplative matters (*si quis venerit nomine suo, eum recipietis*), that I think so well of the collection as I seem to do; and yet I dare not take too much from it, because I have chosen to dedicate it to you. To be short, it is the honour I can do to you at this time. And so I commend me to your love and honourable friendship."

Another paper headed "Mr. Francis Bacon of the Collor of good and evyll, to the Lo. Mountjoye" was found by Stephens among Lord Oxford's MSS. and printed in his "second collection:" since which time it has commonly been prefixed to the tract itself, as if it formed part of the original edition; which is not the case. Neither in the edition of 1597, nor in any of the

many reprints of it which had appeared before, is there any separate dedication prefixed to this fragment. The manuscript however from which Stephens took it (Harl. MSS. 6797. No. 6.) is in a contemporary hand, and one which has been employed in transcribing other papers undoubtedly of Bacon's composition: and I have no doubt that the letter in question was written by Bacon with the intention (whether fulfilled or not) of prefixing it to the work — then perhaps meant only for private circulation in manuscript—by way of dedication. And here it is.

"MR. FRANCIS BACON of the colours of good and evil, to THE LORD MOUNTJOYE.

I send you the last part of the best book of Aristotle of Stagira, who (as your Lordship knoweth) goeth for the best author. But (saving the civil respect which is due to a received estimation) the man being a Grecian and of a hasty wit, having hardly a discerning patience, much less a teaching patience, hath so delivered the matter, as I am glad to do the part of a good househen, which without any strangeness will sit upon pheasants' eggs. And yet perchance some that shall compare my lines with Aristotle's lines, will muse by what art, or rather by what revelation, I could draw these conceits out of that place. But I, that should know best, do freely acknowledge that I had my light from him; for where he gave me not matter to perfect, at the least he gave me occasion to invent. Wherein as I do him right, being myself a man that am as free from envying the dead in contemplation, as from envying the living in action or fortune: so yet nevertheless still I say, and I speak it more largely than before, that in perusing the writings of this person so much celebrated, whether it were the impediment of his wit, or that he did it upon glory and affectation to be subtile, as one that if he had seen his own conceits clearly and perspicuously delivered, perhaps would have been out of love with them himself; or else upon policy to keep himself close, as one that had been a challenger of all the world, and had raised infinite contradiction: to what cause soever it is to be ascribed, I do not find him to deliver and unwrap himself well of that he seemeth to conceive, nor to be a master of his own knowledge. Neither do I for my part also, (though I have brought in a new manner

of handling this argument to make it pleasant and lightsome,) pretend so to have overcome the nature of the subject, but that the full understanding and use of it will be somewhat dark, and best pleasing the tastes of such wits as are patient to stay the digesting and soluting unto themselves of that which is sharp and subtile. Which was the cause, joined with the love and honour which I bear to your Lordship, as the person I know to have many virtues and an excellent order of them, which moved me to dedicate this writing to your Lordship; after the ancient manner: choosing both a friend, and one to whom I conceive the argument was agreeable."

This fragment was never reprinted by Bacon himself, but is appended to most of the reprints of the *Essays* which were published by other people both during his life and for some years after. I have collated it with the original copy in the British Museum, and inserted translations of the Latin sentences.

OF

THE COULERS

OF

GOOD AND EVILL.

A FRAGMENT.

1697.

1. Cui ceteræ partes vel sectæ secundas unanimiter deferunt, cum singulæ principatum sibi vindicent, melior reliquis videtur. Nam primas quæque ex zelo videtur sumere; secundas autem ex vero tribuere.

2. Cujus excellentia vel exuperantia melior, id toto genere melius.

3. Quod ad veritatem refertur majus est quam quod ad opinionem. Modus autem et probatio ejus quod ad opinionem pertinet hæc est: quod quis si clam putaret fore, facturus non esset.

4. Quod rem integram servat bonum, quod sine receptu est malum. Nam se recipere non posse impotentiæ genus est, potentia autem bonum.

5. Quod ex pluribus constat et divisibilius, est majus quam quod ex paucioribus et magis unum: nam omnia per partes considerata majora videntur, quare et pluralitas partium magnitudinem præ se fert: fortius autem operatur pluralitas partium si ordo absit, nam inducit similitudinem infiniti, et impedit comprehensionem.

6. Cujus privatio bona, malum; cujus privatio mala, bonum.

7. Quod bono vicinum, bonum: quod a bono remotum, malum.

8. Quod quis culpa sua contraxit, majus malum; quod ab externis imponitur, minus malum.

9. Quod opera et virtute nostra partum est, majus bonum; quod ab alieno beneficio vel ab indulgentia fortunæ delatum est, minus bonum.

10. Gradus privationis major videtur quam gradus diminutionis; et rursus gradus inceptionis major videtur quam gradus incrementi.

OF THE

COLOURS OF GOOD AND EVIL.

In deliberatives the point is, what is good and what is evil, and of good what is greater, and of evil what is the less.

So that the persuader's labour is to make things appear good or evil, and that in higher or lower degree; which as it may be performed by true and solid reasons, so it may be represented also by colours, popularities and circumstances, which are of such force, as they sway the ordinary judgment either of a weak man, or of a wise man not fully and considerately attending and pondering the matter. Besides their power to alter the nature of the subject in appearance, and so to lead to error, they are of no less use to quicken and strengthen the opinions and persuasions which are true: for reasons plainly delivered, and always after one manner, especially with fine and fastidious minds, enter but heavily and dully: whereas if they be varied and have more life and vigour put into them by these forms and insinuations, they cause a stronger apprehension, and many times suddenly win the mind to a resolution. Lastly, to make a true and safe judgment, nothing can be of greater use and defence to the mind, than the discovering and reprehension of these colours, shewing in what cases they hold, and in what they deceive: which as it cannot be done, but out of a very universal knowledge of the nature of things, so being performed, it so cleareth man's judgment and election, as it is the less apt to slide into any error.

A TABLE OF COLOURS OR APPEARANCES OF GOOD AND EVIL, AND THEIR DEGREES, AS PLACES OF PERSUASION AND DISSUASION, AND THEIR SEVERAL FALLAXES, AND THE ELENCHES OF THEM.

I.

Cui cæteræ partes vel sectæ secundas unanimiter deferunt, cum singulæ principatum sibi vendicent, melior reliquis videtur. Num primas quæque ex zelo videtur sumere, secundas autem ex vero et merito tribuere. [That to which all other parties or sects agree in assigning the second place (each putting itself first) should be the best: for the assumption of the first place is probably due to partiality, the assignation of the second to truth and merit.]

So Cicero went about to prove the sect of Academics, which suspended all asseveration, for to be the best: for, saith he, ask a Stoic which philosophy is true, he will prefer his own. Then ask him which approacheth next the truth, he will confess the Academics. So deal with the Epicure, that will scant endure the Stoic to be in sight of him; as soon as he hath placed himself, he will place the Academics next him.

So if a prince took divers competitors to a place, and examined them severally, whom next themselves they would rathest commend, it were like the ablest man should have the most second votes.

The fallax of this colour happeneth oft in respect of envy; for men are accustomed after themselves and their own faction to incline unto them which are softest, and are least in their way, in despite and derogation of them that hold them hardest to it. So that this colour of meliority and pre-eminence is a sign of enervation and weakness.

II.

Cujus excellentia vel exuperantia melior, id toto genere melius. [That which is best when in perfection, is best altogether.]

Appertaining to this are the forms: *Let us not wander in generalities: Let us compare particular with particular,* &c.

This appearance, though it seem of strength, and rather logical than rhetorical, yet is very oft a fallax.

Sometimes because some things are in kind very casual, which if they escape prove excellent; so that the kind is inferior, because it is so subject to peril, but that which is excellent being proved is superior; as the blossom of March and the blossom of May, whereof the French verse goeth:

> Burgeon de Mars, enfans de Paris,
> Si un eschape, il en vaut dix.

So that the blossom of May is generally better than the blossom of March; and yet the best blossom of March is better than the best blossom of May.

Sometimes because the nature of some kinds is to be more equal and more indifferent, and not to have very distant degrees, as hath been noted in the warmer climates the people are generally more wise, but in the northern climate the wits of chief are greater. So in many armies, if the matter should be tried by duel between two champions, the victory should go on one side, and yet if it be tried by the gross, it would go of the other side: for excellencies go as it were by chance, but kinds go by a more certain nature, as by discipline in war.

Lastly, many kinds have much refuse, which countervail that which they have excellent; and therefore generally metal is more precious than stone, and yet a diamond is more precious than gold.

III.

Quod ad veritatem refertur majus est quam quod ad opinionem. Modus autem et probatio ejus quod ad opinionem pertinet hæc est, quod quis si clam putaret fore, facturus non esset. [That which has relation to truth is greater than that which has relation to opinion: and the proof that a thing has relation to opinion is this: It is what a man would not do, if he thought it would not be known.]

So the Epicures say of the Stoics' felicity placed in virtue; that it is like the felicity of a player, who if he were left of his auditory and their applause, he would straight be out of heart and countenance; and therefore they call virtue *bonum theatrale*. But of riches the poet saith:

> Populus me sibilat, at mihi plaudo.
> [The people hiss me, but I applaud myself.]

And of pleasure,

Grata sub imo
Gaudia corde premens, vultu simulante pudorem.

[Her face said "fie for shame;" but inly blest,
She nursed the secret pleasure in her breast.]

The fallax of this colour is somewhat subtile, though the answer to the example be ready; for virtue is not chosen *propter auram popularem;* but contrariwise, *maxime omnium teipsum reverere,* [a man should above all reverence himself]: so as a virtuous man will be virtuous *in solitudine,* and not only *in theatro,* though percase it will be more strong by glory and fame, as an heat which is doubled by reflexion. But that denieth the supposition, it doth not reprehend the fallax, whereof the reprehension is: Allow that virtue (such as is joined with labour and conflict) would not be chosen but for fame and opinion, yet it followeth not that the chief motive of the election should not be real and for it self; for fame may be only *causa impulsiva,* and not *causa constituens or efficiens.* As if there were two horses, and the one would do better without the spur than the other: but again, the other with the spur would far exceed the doing of the former, giving him the spur also; yet the latter will be judged to be the better horse. And the form as to say, *Tush, the life of this horse is but in the spur,* will not serve as to a wise judgment: for since the ordinary instrument of horsemanship is the spur, and that it is no manner of impediment nor burden, the horse is not to be accounted the less of which will not do well without the spur, but rather the other is to be reckoned a delicacy than a virtue: so glory and honour are as spurs to virtue: and although virtue would languish without them, yet since they be always at hand to attend virtue, virtue is not to be said the less chosen for itself because it needeth the spur of fame and reputation: and therefore that position, *nota ejus rei quod propter opinionem et non propter veritatem eligitur, hæc est, quod quis si clam putaret fore facturus non esset,* is reprehended.

IV.

Quod rem integram servat bonum, quod sine receptu est malum. Nam se recipere non posse impotentiæ genus est, potentia autem bonum. [That course which keeps the matter in a man's power is good; that which leaves him without retreat is

bad: for to have no means of retreating is to be in a sort powerless; and power is a good thing.]

Hereof Æsop framed the fable of the two frogs, that consulted together in the time of drought, (when many plashes that they had repaired to were dry,) what was to be done; and the one propounded to go down into a deep well, because it was like the water would not fail there; but the other answered, yea but if it do fail, how shall we get up again? And the reason is, that human actions are so uncertain and subject to perils, as that seemeth the best course which hath most passages out of it.

Appertaining to this persuasion, the forms are, *you shall engage yourself;* on the other side, *tantum quantum voles sumes ex fortuna,* &c. you shall keep the matter in your own hands. The reprehension of it is, *that proceeding and resolving in all actions is necessary:* for as he saith well, *not to resolve is to resolve;* and many times it breeds as many necessities, and engageth as far in some other sort, as to resolve.

So it is but the covetous man's disease translated into power; for the covetous man will enjoy nothing, because he will have his full store and possibility to enjoy the more; so by this reason a man should execute nothing, because he should be still indifferent and at liberty to execute anything. Besides necessity and this same *jacta est alea* hath many times an advantage, because it awaketh the powers of the mind, and strengtheneth endeavour. *Cæteris pares necessitate certe superiores estis:* [Being equal otherwise, in necessity you have the better.]

V.

Quod ex pluribus constat et divisibilius, est majus quam quod ex paucioribus et magis unum: nam omnia per partes considerata majora videntur; quare et pluralitas partium magnitudinem præ se fert: fortius autem operatur pluralitas partium si ordo absit, nam inducit similitudinem infiniti, et impedit comprehensionem. [That which consists of more things and is more divisible, is greater than that which consists of fewer and is more of one piece: for all things seem greater when they are considered part by part; and therefore plurality of parts carries a show of magnitude. Also plurality of parts has the greater effect when there is no order in them; for the want of order gives it a resemblance to infinity and prevents comprehension.]

This colour seemeth palpable, for it is not plurality of parts without majority of parts that maketh the total greater; yet nevertheless it often carries the mind away; yea it deceiveth the sense; as it seemeth to the eye a shorter distance of way if it be all dead and continued, than if it have trees or buildings or any other marks whereby the eye may divide it. So when a great monied man hath divided his chests and coins and bags, he seemeth to himself richer than he was, and therefore a way to amplify anything is to break it and to make an anatomy of it in several parts, and to examine it according to several circumstances. And this maketh the greater shew if it be done without order; for confusion maketh things muster more; and besides, what is set down by order and division, doth demonstrate that nothing is left out or omitted, but all is there; whereas if it be without order, both the mind comprehendeth less that which is set down, and besides it leaveth a suspicion, as if more might be said than is expressed.

This colour deceiveth, if the mind of him that is to be persuaded do of itself over-conceive or prejudge of the greatness of anything; for then the breaking of it will make it seem less, because it maketh it to appear more according to the truth: and therefore if a man be in sickness or pain, the time will seem longer without a clock or hour-glass, than with it; for the mind doth value every moment, and then the hour doth rather sum up the moments than divide the day. So in a dead plain the way seemeth the longer, because the eye hath preconceived it shorter than the truth, and the frustrating of that maketh it seem longer than the truth. Therefore if any man have an over-great opinion of anything, then if another think by breaking it into several considerations he shall make it seem greater to him, he will be deceived; and therefore in such cases it is not safe to divide, but to extol the entire still in general.

Another case wherein this colour deceiveth is when the matter broken or divided is not comprehended by the sense or mind at once, in respect of the distracting or scattering of it; and being entire and not divided, is comprehended: as a hundred pounds in heaps of five pounds will shew more than in one gross heap, so as the heaps be all upon one table to be seen at once, otherwise not; or flowers growing scattered in divers

beds will shew more than if they did grow in one bed, so as all those beds be within a plot, that they be object to view at once, otherwise not; and therefore men whose living lieth together in one shire, are commonly counted greater landed than those whose livings are dispersed, though it be more, because of the notice and comprehension.

A third case wherein this colour deceiveth, and it is not so properly a case or reprehension as it is a counter colour, being in effect as large as the colour itself, and that is, *omnis compositio indigentiæ cujusdam videtur esse particeps* [all composition implies some neediness]: because if one thing would serve the turn it were ever best, but the defect and imperfections of things hath brought in that help to piece them up; as it is said, *Martha, Martha, attendis ad plurima, unum sufficit.* [Martha, thou art busied about many things: one thing sufficeth.] So likewise hereupon Æsop framed the fable of the fox and the cat; whereas the fox bragged what a number of shifts and devices he had to get from the hounds, and the cat said she had but one, which was to climb a tree, which in proof was better worth than all the rest; whereof the proverb grew, *Multa novit vulpes, sed felis unum magnum.* And in the moral of this fable it comes likewise to pass, that a good sure friend is a better help at a pinch than all the stratagems and policies of a man's own wit. So it falleth out to be a common error in negociating, whereas men have many reasons to induce or persuade, they strive commonly to utter and use them all at once, which weakeneth them. For it argueth, as was said, a neediness in every of the reasons by itself, as if one did not trust to any of them, but fled from one to another, helping himself only with that, *Et quæ non prosunt singula, multa juvant:* [One will not help, but many will.] Indeed in a set speech in an assembly it is expected a man should use all his reasons in the case he handleth, but in private persuasions it is always a great error.

A fourth case wherein this colour may be reprehended, is in respect of that same *vis unita fortior;* according to the tale of the French King, that when the Emperor's ambassador had recited his master's stile at large, which consisteth of many countries and dominions, the French King willed his Chancellor or other minister to repeat and say over France as many times as the other had recited the several dominions; intending

it was equivalent with them all, and besides more compacted and united.

There is also appertaining to this colour another point, why breaking of a thing doth help it, not by way of adding a shew of magnitude unto it, but a note of excellency and rarity; whereof the forms are, *Where shall you find such a concurrence? Great but not complete;* for it seems a less work of nature or fortune to make anything in his kind greater than ordinary, than to make a strange composition.

Yet if it be narrowly considered, this colour will be reprehended or encountered by imputing to all excellencies in compositions a kind of poverty, or at least a casualty or jeopardy; for from that which is excellent in greatness, somewhat may be taken, or there may be decay, and yet sufficiency left; but from that which hath his price in composition, if you take away anything, or any part do fail, all is disgraced.

VI.

Cujus privatio bona, malum; cujus privatio mala, bonum. [That which it is good to be rid of is evil; that which it is evil to be rid of is good.]

The forms to make it conceived, that that was evil which is changed for the better, are, *He that is in hell thinks there is no other heaven. Satis quercus; Acorns were good till bread was found,* &c. And of the other side, the forms to make it conceived that that was good which was changed for the worse, are, *Bona magis carendo quam fruendo sentimus:* [it is by missing a good thing that we become sensible of it:] *Bona a tergo formosissima: Good things never appear in their full beauty, till they turn their back and be going away,* &c.

The reprehension of this colour is, that the good or evil which is removed, may be esteemed good or evil comparatively, and not positively or simply. So that if the privation be good, it follows not the former condition was evil, but less good: for the flower or blossom is a positive good, although the remove of it to give place to the fruit be a comparative good. So in the tale of Æsop, when the old fainting man in the heat of the day cast down his burthen and called for death, and when death came to know his will with him, said it was for nothing but to help him up with his burthen again: it doth not follow that

because death, which was the privation of the burthen, was ill, therefore the burthen was good. And in this part, the ordinary form of *malum necessarium* aptly reprehendeth this colour; for *privatio mali necessarii est mala*, [to be deprived of an evil that is necessary, is evil,] and yet that doth not convert the nature of the necessary evil, but it is evil.

Again, it cometh sometimes to pass, that there is an equality in the change or privation, and as it were a *dilemma boni* or a *dilemma mali:* so that the corruption of the one good is a generation of the other; *Sorti pater æquus utrique est:* [there is good either way:] and contrary, the remedy of the one evil is the occasion and commencement of another, as in Scylla and Charybdis.

VII.

Quod bono vicinum, bonum; quod a bono remotum, malum. [That which is next to a good thing is good; that which is far off, is evil.]

Such is the nature of things, that things contrary and distant in nature and quality are also severed and disjoined in place, and things like and consenting in quality are placed and as it were quartered together: for partly in regard of the nature to spread, multiply, and infect in similitude, and partly in regard of the nature to break, expel, and alter that which is disagreeable and contrary, most things do either associate and draw near to themselves the like, or at least assimilate to themselves that which approacheth near them, and do also drive away, chase, and exterminate their contraries. And that is the reason commonly yielded, why the middle region of the air should be coldest, because the sun and stars are either hot by direct beams or by reflexion. The direct beams heat the upper region, the reflected beams from the earth and seas heat the lower region. That which is in the midst, being furthest distant in place from these two regions of heat, are most distant in nature, that is, coldest; which is that they term cold or hot *per antiperistasin*, that is invironing by contraries: which was pleasantly taken hold of by him that said, that an honest man in these days must needs be more honest than in ages heretofore, *propter antiperistasin*, because the shutting of him in the midst of contraries must needs make the honesty stronger and more compact in itself.

The reprehension of this colour is, first, many things of amplitude in their kind do as it were ingross to themselves all, and leave that which is next them most destitute: as the shoots or underwood that grow near a great and spread tree is the most pined and shrubby wood of the field, because the great tree doth deprive and deceive them of sap and nourishment. So he saith well, *divitis servi maxime servi*, [the servants of a rich man are most servants;] and the comparison was pleasant of him that compared courtiers attendant in the courts of princes, without great place or office, to fasting-days, which were next the holy-days, but otherwise were the leanest days in all the week.

Another reprehension is, that things of greatness and predominancy, though they do not extenuate the things adjoining in substance, yet they drown them and obscure them in show and appearance. And therefore the astronomers say, that whereas in all other planets conjunction is the perfectest amity; the sun contrariwise is good by aspect, but evil by conjunction.

A third reprehension is, because evil approacheth to good sometimes for concealment, sometimes for protection; and good to evil for conversion and reformation. So hypocrisy draweth near to religion for covert and hiding itself; *sæpe latet vitium proximitate boni*, [vice lurks in the neighbourhood of virtue;] and sanctuary-men, which were commonly inordinate men and malefactors, were wont to be nearest to priests and prelates, and holy men; for the majesty of good things is such, as the confines of them are revered. On the other side, our Saviour, charged with nearness of publicans and rioters, said, *The physician approacheth the sick rather than the whole.*

VIII.

Quod quis culpa sua contraxit, majus malum, quod ab externis imponitur, minus malum. [The ill that a man brings on himself by his own fault is greater; that which is brought on him from without is less.]

The reason is, because the sting and remorse of the mind accusing itself doubleth all adversity: contrariwise, the considering and recording inwardly that a man is clear and free from fault and just imputation doth attemper outward calamities. For if the evil be in the sense and in the conscience

both, there is a gemination of it; but if evil be in the one and comfort in the other, it is a kind of compensation. So the poets in tragedies do make the most passionate lamentations, and those that fore-run final despair, to be accusing, questioning, and torturing of a man's self.

Seque unum clamat causamque caputque malorum.

And contrariwise, the extremities of worthy persons have been annihilated in the consideration of their own good deserving. Besides, when the evil cometh from without, there is left a kind of evaporation of grief, if it come by human injury, either by indignation and meditating of revenge from ourselves, or by expecting or fore-conceiving that Nemesis and retribution will take hold of the authors of our hurt; or if it be by fortune or accident, yet there is left a kind of expostulation against the divine powers;

Atque Deos atque astra vocat crudelia mater.

But where the evil is derived from a man's own fault, there all strikes deadly inwards and suffocateth.

The reprehension of this colour is first in respect of hope; for reformation of our faults is *in nostra potestate*, but amendment of our fortune simply is not. Therefore Demosthenes in many of his orations saith thus to the people of Athens: *That which having regard to the time past is the worst point and circumstance of all the rest, that as to the time to come is the best. What is that? Even this, that by your sloth, irresolution, and misgovernment, your affairs are grown to this declination and decay. For had you used and ordered your means and forces to the best, and done your parts every way to the full, and notwithstanding your matters should have gone backward in this manner as they do, there had been no hope left of recovery or reparation; but since it hath been only by your own errors*, &c. So Epictetus in his degrees saith, *The worst state of man is to accuse extern things; better than that to accuse a man's self; and best of all to accuse neither.*

Another reprehension of this colour is in respect of the well bearing of evils wherewith a man can charge nobody but himself, which maketh them the less.

Leve fit quod bene fertur onus.
[The burden is lightened which is well borne.]

And therefore many natures that are either extremely proud, and will take no fault to themselves, or else very true and cleaving to themselves, (when they see the blame of anything that falls out ill must light upon themselves,) have no other shift but to bear it out well, and to make the least of it; for as we see when sometimes a fault is committed, and before it be known who is to blame, much ado is made of it, but after, if it appear to be done by a son or by a wife or by a near friend, then it is light made of; so much more when a man must take it upon himself. And therefore it is commonly seen, that women that marry husbands of their own choosing against their friends' consents, if they be never so ill used, yet you shall seldom see them complain, but to set a good face on it.

IX.

Quod operâ et virtute nostrâ partum est, majus bonum; quod ab alieno beneficio vel ab indulgentiâ fortunæ delatum est, minus bonum. [The good that is won by a man's own effort and virtue, is greater; that which is derived from the beneficence of another, or from the favour of fortune, is less.]

The reasons are, first, the future hope; because in the favours of others or the good winds of fortune we have no state or certainty; in our endeavours or abilities we have. So as when they have purchased us one good fortune, we have them as ready and better edged and inured to procure another.

The forms be: *you have won this by play; you have not only the water, but you have the receipt, you can make it again if it be lost*, &c.

Next, because these properties which we enjoy by the benefit of others, carry with them an obligation, which seemeth a kind of burthen; whereas the other which derive from ourselves, are like the freest patents, *absque aliquo inde reddendo;* and if they proceed from fortune or providence, yet they seem to touch us secretly with the reverence of the divine powers whose favours we taste, and therefore work a kind of religious fear and restraint: whereas in the other kind, that comes to pass which the prophet speaketh, *lætantur et exultant, immolant plagis suis, et sacrificant reti suo.* [They rejoice and exult, they sacrifice unto their net, and burn incense unto their drag.]

Thirdly, because that which cometh unto us without our own virtue, yieldeth not that commendation and reputation: for actions of great felicity may draw wonder, but praiseless; as Cicero said to Cæsar, *Quæ miremur, habemus; quæ laudemus, expectamus:* [Here is enough to admire, but what is there to praise?]

Fourthly, because the purchases of our own industry are joined commonly with labour and strife, which gives an edge and appetite, and makes the fruition of our desire more pleasant. *Suavis cibus a venatu:* [Meat taken in hunting is sweet.]

On the other side, there be four counter colours to this colour, rather than reprehensions, because they be as large as the colour itself. First, because felicity seemeth to be a character of the favour and love of the divine powers, and accordingly worketh both confidence in ourselves, and respect and authority from others. And this felicity extendeth to many casual things, whereunto the care or virtue of man cannot extend, and therefore seemeth to be a larger good; as when Cæsar said to the sailor, *Cæsarem portas et fortunam ejus,* [You carry Cæsar and his fortune;] if he had said *et virtutem ejus* [and his virtue,] it had been small comfort against a tempest, otherwise than if it might seem upon merit to induce fortune.

Next, whatsoever is done by virtue and industry, seems to be done by a kind of habit and art, and therefore open to be imitated and followed; whereas felicity is inimitable.[1] So we generally see that things of nature seem more excellent than things of art, because they be imitable: for *quod imitabile est potentia quadam vulgatum est:* [That which can be imitated is potentially common.]

Thirdly, felicity commendeth those things which cometh without our own labour; for they seem gifts, and the other seems pennyworths: whereupon Plutarch saith elegantly of the acts of Timoleon, who was so fortunate, compared with the acts of Agesilaus and Epaminondas, that *they were like Homer's verses, they ran so easily and so well;* and therefore it is the word we give unto poesy, terming it a happy vein, because facility seemeth ever to come from happiness.

[1] The original, which is not very correctly printed, has *imitable.* In the next clause, the construction being ambiguous, *imitable* may possibly be right.

Fourthly, this same *præter spem, vel præter expectatum,* doth increase the price and pleasure of many things; and this cannot be incident to those things that proceed from our own care and compass.

X.

Gradus privationis major videtur quam gradus diminutionis; et rursus gradus inceptionis major videtur quam gradus incrementi. [From having something to having nothing is a greater step than from having more to having less: and again from having nothing to having something is a greater step than from having less to having more.]

It is a position in the mathematics, that there is no proportion between somewhat and nothing, therefore the degree of nullity and quiddity or act, seemeth larger than the degrees of increase and decrease; as to a monoculos it is more to lose one eye, than to a man that hath two eyes. So if one have lost divers children, it is more grief to him to lose the last than all the rest; because he is *spes gregis.* And therefore Sibylla, when she brought her three books, and had burned two, did double the whole price of both the other, because the burning of that had been *gradus privationis,* and not *diminutionis.*

This colour is reprehended first in those things, the use and service whereof resteth in sufficiency, competency, or determinate quantity: as if a man be to pay one hundred pounds upon a penalty, it is more to him to want twelve pence, than after that twelve pence supposed to be wanting, to want ten shillings more; so the decay of a man's estate seems to be most touched in the degree when he first grows behind, more than afterwards when he proves nothing worth. And hereof the common forms are, *Sera in fundo parsimonia,* [Sparing comes too late when all is gone,] and, *as good never a whit, as never the better,* &c. It is reprehended also in respect of that notion, *Corruptio unius, generatio alterius:* [The corruption of one thing is the generation of another:] so that *gradus privationis* is many times less matter, because it gives the cause and motive to some new course. As when Dêmosthenes reprehended the people for hearkening to the conditions offered by King Philip, being not honourable nor equal, he saith they

were but aliments[1] of their sloth and weakness, which if they were taken away, necessity would teach them stronger resolutions. So Doctor Hector was wont to say to the dames of London, when they complained they were they could not tell how, but yet they could not endure to take any medicine; he would tell them, their way was only to be sick, for then they would be glad to take any medicine.

Thirdly, this colour may be reprehended, in respect that the degree of decrease is more sensitive than the degree of privation; for in the mind of man *gradus diminutionis* may work a wavering between hope and fear, and so keep the mind in suspense from settling and accommodating in patience and resolution. Hereof the common forms are, *better eye out than always ache; make or mar*, &c.

For the second branch of this colour, it depends upon the same general reason: hence grew the common place of extolling the beginning of everything: *dimidium qui bene cœpit habet:* [Well begun is half done.] This made the astrologers so idle as to judge of a man's nature and destiny by the constellation of the moment of his nativity or conception. This colour is reprehended, because many inceptions are but, as Epicurus termeth them, *tentamenta*, that is, imperfect offers and essays, which vanish and come to no substance without an iteration; so as in such cases the second degree seems the worthiest, as the body-horse in the cart, that draweth more than the fore-horse. Hereof the common forms are, *The second blow makes the fray, The second word makes the bargain: Alter principium dedit, alter modum abstulit*[2], [the one made a beginning of the mischief, the other made no end] &c. Another reprehension of this colour is in respect of defatigation, which makes perseverance of greater dignity than inception: for chance or instinct of nature may cause inception[3]: but settled affection or judgment maketh the continuance.

Thirdly, this colour is reprehended in such things, which have a natural course and inclination contrary to an inception. So that the inception is continually evacuated and gets no start, but there behoveth *perpetua inceptio;* as in the common form, *Non progredi est regredi; Qui non proficit deficit:* [Not to

[1] The original has *elements:* certainly a misprint.
[2] *alter abstulit*, in the original.
[3] In the original, this whole clause (for . . . inception) is omitted.

go forward is to go back: he that does not get on, falls off:] running against the hill, rowing against the stream, &c. For if it be with the stream or with the hill, then the degree of inception is more than all the rest.

Fourthly, this colour is to be understood of *gradus inceptionis a potentia ad actum, comparatus cum gradu ab actu ad incrementum:* [the step from power to act compared with the step from act to increase.] For otherwise *major videtur gradus ab impotentia ad potentiam, quam a potentia ad actum:* [from impotence to power appears to be a greater step than from power to act.]

LETTER AND DISCOURSE

TO

SIR HENRY SAVILL,

TOUCHING

HELPS FOR THE INTELLECTUAL POWERS.

PREFACE.

THIS fragment might perhaps have been placed more properly in the third volume, among the philosophical works. The subject of it is touched, though very briefly, in the fourth chapter of the sixth book of the *De Augmentis*, under the head of *Ars Pædagogica*; which, had it been completed, would apparently have been its proper place. And considering that Bacon had taken the subject so far into consideration, found that there was much to be said about it, and proceeded so short a way with it himself, it is rather strange to me that he did not set down these *Georgica Intellectus* in his catalogue of *Desiderata*. It forms no part however of his Philosophy properly so called; and may take its place here among the *Civilia et Moralia* without any impropriety; what there is of it being very welcome, and only making one wish that there were more.

It was first printed by Dr. Rawley in the *Resuscitatio* (1657); and appears to have been written some time between 1596 and 1604: not before 1596, because it was in that year that Savill became Provost of Eton; not later than 1604, because in the two most authentic manuscripts which I have met with the letter begins "Mr. Savill;" and it was in 1604 that he became Sir Henry. One of these manuscripts is in a collection of Bacon's letters transcribed in the hand of one of his servants, and bearing in one page traces of his own. I take it to be a copy of the "Register of letters" which he speaks of in his will, and from which Rawley professes to have taken the collection in the *Resuscitatio*. At any rate it is a good manuscript, and of good authority: as I can myself testify, having had occasion to compare a great number of the letters with the

original draughts and corrected copies (now in the Lambeth Library) from which the transcript was no doubt made. This volume is now in the British Museum (Additional MSS. 5503.); and contains a copy of the "Letter to Mr. Savill" which accompanied the "Discourse," though not the Discourse itself.

The other manuscript (Additional MSS. 629. fo. 274.) is in a hand of the time, and probably belonged to Dr. Rawley; and though not a perfectly accurate transcript originally, it has been corrected from a better copy, — I think by Tenison. It contains both the Letter and the Discourse; for which last I take it to be the best authority now extant.

A

LETTER AND DISCOURSE

TO SIR HENRY SAVILL,

TOUCHING HELPS FOR THE INTELLECTUAL POWERS.

MR. SAVILL.

COMING back from your invitation at Eton, where I had refreshed myself with company which I loved, I fell into a consideration of that part of policy, whereof philosophy speaketh too much and laws too little; and that is of Education of youth. Whereupon fixing my mind a while, I found straightways and noted, even in the discourses of philosophers, which are so large in this argument, a strange silence concerning one principal part of that subject. For as touching the framing and seasoning of youth to moral virtues, tolerance of labours, continency from pleasures, obedience, honour, and the like, they handle it; but touching the improvement and helping of the intellectual powers, as of conceit, memory, and judgment, they say nothing. Whether it were that they thought it to be a matter wherein nature only prevailed; or that they intended it as referred to the several and proper arts which teach the use of reason and speech. But for the former of these two reasons, howsoever it pleaseth them to distinguish of habits and powers, the experience is manifest enough that the motions and faculties of the wit and memory may be not only governed and guided, but also confirmed and enlarged, by custom and exercise duly applied: As if a man exercise shooting, he shall not only shoot nearer the mark but also draw a stronger bow. And as for the latter,

of comprehending these precepts within the arts of logic and rhetoric, if it be rightly considered, their office is distinct altogether from this point. For it is no part of the doctrine of the use or handling of an instrument to teach how to whet or grind the instrument to give it a sharp edge, or how to quench it or otherwise, whereby to give it a stronger temper. Wherefore finding this part of knowledge not broken, I have but *tanquam aliud agens* entered into it, and salute you with it, dedicating it after the ancient manner, first as to a dear friend, and then as to an apt person, for as much as you have both place to practise it, and judgment and leisure to look deeper into it than I have done. Herein you must call to mind Ἄριστον μὲν ὕδωρ. Though the argument be not of great heighth and dignity, nevertheless it is of great and universal use. And yet I do not see why (to consider it rightly) that should not be a learning of height, which teacheth to raise the highest and worthiest part of the mind. But howsoever that be, if the world take any light and use by this writing, I will that the gratulation be, to the good friendship and acquaintance between us two. And so I commend you to God's divine protection.

A DISCOURSE TOUHING HELPS FOR THE INTELLECTUAL POWERS.[1]

I DID ever hold it for an insolent and unlucky saying, *Faber quisque suæ fortunæ*, except it be uttered only as a hortative or spur to correct sloth. For otherwise, if it be believed as it soundeth, and that a man entereth into a high imagination that he can compass and fathom all accidents, and ascribeth all successes to his drifts and reaches and the contrary to his errors and sleepings, it is commonly seen that the evening fortune of that man is not so prosperous, as of him that without slackening of his industry attributeth much to felicity and providence above him. But if the sentence were turned to this, *Faber quisque ingenii sui*, it were somewhat moretrue and muchmore profitable; because it would teach men to bend themselves to reform those imperfections in themselves, which now they seek but to cover; and to attain those virtues and good parts, which

[1] This title is inserted here in the *Resuscitatio*. It is not in the Manuscript.

now they seek but to have only in shew and demonstration. Yet notwithstanding every man attempteth to be of the first trade of carpenters, and few bind themselves to the second: whereas nevertheless the rising in fortune seldom amendeth the mind; but on the other side the removing of the stonds and impediments of the mind doth often clear the passage and current of a man's fortune. But certain it is, whether it be believed or no, that as the most excellent of metals, gold, is of all other the most pliant and most enduring to be wrought; so of all living and breathing substances, the perfectest (Man) is the most susceptible of help, improvement, impression, and alteration. And not only in his body, but in his mind and spirit. And there again not only in his appetite and affection, but in his power of wit and reason.

For as to the body of man, we find many and strange experiences how nature is overwrought by custom, even in actions that seem of most difficulty and least possible. As first in Voluntary Motion; which though it be termed voluntary, yet the highest degrees of it are not voluntary; for it is in my power and will to run; but to run faster than according to my lightness or disposition of body, is not in my power nor will. We see the industry and practice of tumblers and funambulos, what effects of great wonder it bringeth the body of man unto. So for suffering of pain and dolour, which is thought so contrary to the nature of man, there is much example of penances in strict orders of superstition, what they do endure; such as may well verify the report of the Spartan boys, which were wont to be scourged upon the altar so bitterly as sometimes they died of it, and yet were never heard complain. And to pass to those faculties which are reckoned to be more involuntary, as long fasting and abstinence, and the contrary extreme (voracity); the leaving and forbearing the use of drink for altogether; the enduring vehement cold; and the like; there have not wanted, neither do want, divers examples of strange victories over the body in every of these. Nay in respiration, the proof hath been of some, who by continual use of diving and working under the water have brought themselves to be able to hold their breath an incredible time. And others that have been able without suffocation to endure the stifling breath of an oven or furnace so heated, as, though it did not scald nor burn, yet it was many degrees too hot for any man,

not made to it, to breathe or take in. And some impostors and counterfeits likewise have been able to wreath and cast their bodies into strange forms and motions: yea and others to bring themselves into trances and astonishments. All which examples do demonstrate how variously, and to how high points and degrees, the body of man may be (as it were) moulded and wrought. And if any man conceive that it is some secret propriety of nature that hath been in those persons which have attained to these points, and that it is not open for every man to do the like, though he had been put to it; for which cause such things come but very rarely to pass; it is true, no doubt but some persons are apter than other; but so as the more aptness causes perfection, but the less aptness doth not disable; so that for example, the more apt child that is taken to be made a *funambulo*, will prove more excellent in his feats; but the less apt will be *gregarius funambulo* also. And there is small question but that these abilities would have been more common, and others of like sort not attempted would likewise have been brought upon the stage, but for two reasons. The one because of men's diffidence in prejudging them as impossibilities; for it holdeth in those things, which the poet saith, *Possunt quia posse videntur;* for no man shall know how much may be done, except he believe much may be done. The other reason is, because they be but practices base and inglorious, and of no great use; and therefore sequestred from reward of value; and on the other side, painful; so as the recompence balanceth not with the travel and suffering. And as to the will of man, it is that which is most maniable and obedient; as that which admitteth most medicines to cure and alter it. The most sovereign of all is Religion, which is able to change and transform it in the deepest and most inward inclinations and motions. And next to that is Opinion and Apprehension; whether it be infused by tradition and institution, or wrought in by disputation and persuasion. And the third is example, which transformeth[1] the will of man into the similitude of that which is much obversant and familiar towards it. And the fourth is, when one affection is healed and corrected by another; as when cowardice is remedied by

[1] So Resusc. MS. 629. has "which bound with the will of man"—and in the next clause "observant" instead of "obversant." I suspect "transformeth" to be a conjectural emendation, and not the right one. The Resusc. has *most* instead of *much*.

shame and dishonour, or sluggishness and backwardness by indignation and emulation; and so of the like. And lastly, when all these means, or any of them, have new framed or formed human will, then doth custom and habit corroborate and confirm all the rest. Therefore it is no marvel though this faculty of the mind of will and election, which inclineth affection and appetite, being but the inceptions and rudiments of will, may be so well governed and managed, because it admitteth access to so divers remedies to be applied to it and to work upon it. The effects whereof are so many and so known as require no enumeration; but generally they do issue, as medicines do, into two kinds of cures; whereof the one is a just or true cure, and the other is called palliation. For either the labour and intention is to reform the affections really and truly, restraining them if they be too violent, and raising them if they be too soft and weak, or else it is to cover them; or if occasion be, to pretend and represent them: of the former sort whereof the examples are plentiful in the schools of philosophers, and in all other institutions of moral virtue; and of the other sort the examples are more plentiful in the courts of princes, and in all politic traffic, where it is ordinary to find not only profound dissimulations and suffocating the affections that no note or mark appear of them outwardly, but also lively simulations and affectations, carrying the tokens of passions which are not, as *risus jussus* and *lachrymæ coactæ*, and the like.

OF HELP OF THE INTELLECTUAL POWERS.

THE intellectual powers have fewer means to work upon them than the will or body of man; but the one that prevaileth, that is exercise, worketh more forcibly in them than in the rest.

The ancient habit of the philosophers; *Si quis quærat in utramque partem de omni scibili.*

The exercise of scholars making verses ex tempore; *Stans pede in uno.*

The exercise of lawyers in memory narrative.

The exercise of sophists, and *Jo. ad oppositum*, with manifest effect.

Artificial memory greatly holpen by exercise.

The exercise of buffons, to draw all things to conceits ridiculous.

The means that help the understanding and faculties thereof are:—

Not example, as in the will, by conversation; and here the conceit of imitation, already disgested, with the confutation *obiter, si videbitur*, of Tully's opinion, advising a man to take some one to imitate. Similitude of faces analysed.

Arts, Logic, Rhetoric. The Ancients, Aristotle, Plato, Theætetus, Gorgias, Litigiosus vel Sophista, qu. Protagoras, Aristotle, Schola sua. Topics, Elenchs, Rhetorics, Organon, Cicero, Hermogenes. The Neoterics, Ramus, Agricola, *Nil sacri*, Lullius Typocosmia; studying Cooper's Dictionary; Mattheus Collection of proper words for Metaphors; Agrippa *de Vanitate*, &c.

Qu. if not here of imitation.

Collections preparative. Aristotle's similitude of a shoemaker's shop, full of shoes of all sorts; Demosthenes *Exordia Concionum*. Tully's precept of Theses of all sorts preparative.

The relying upon exercise, with the difference of using and tempering the instrument; and the similitude of prescribing against the laws of nature and of estate.

FIVE POINTS.

1. That exercises are to be framed to the life; that is to say, to work ability in that kind, whereof a man in the course of actions shall have most use.

2. The indirect[1] and oblique exercises which do *per partes* and *per consequentiam* inable those faculties, which perhaps direct exercise at first would but distort. And those have chiefly place where the faculty is weak not *per se* but *per accidens*. As if want of memory grow through lightness of wit and want of stayed attention, then the mathematics or the law helpeth; because they are things wherein if the mind once roam it cannot recover.

3. Of the advantages of exercise; as to dance with heavy shoes, to march with heavy armour and carriage; and the contrary advantage (in natures very dull and unapt) of working alacrity by framing an exercise with some delight and affection;

veluti pueris dant crustula blandi
Doctores, elementa velint ut discere prima.

[1] A blank is left in the MS. for this word.

4. Of the cautions of exercise; as to beware lest by evil doing, as all beginners do weakly, a man grow and be inveterate in an ill habit; and so take not the advantage of custom in perfection, but in confirming ill.

Slubbering on the lute.

5. The marshalling and sequel of sciences and practices: Logic and Rhetoric should be used to be read after Poesy, History, and Philosophy. First exercise to do things well and clean; after, promptly and readily.

I.

The exercises in the universities and schools are of memory and invention; either to speak by heart that which is set down *verbatim*, or to speak *ex tempore;* whereas there is little use in action of either of both: but most things which we utter are neither verbally premeditate, nor merely extemporal. Therefore exercise would be framed to take a little breathing; and to consider of heads; and then to form and fit the speech *ex tempore*. This would be done in two manners, both with writing and tables, and without: for in most actions it is permitted and passable to use the note; whereunto if a man be not accustomed, it will put him out.

There is no use of a Narrative Memory in academies, viz. with circumstances of times, persons, and places, and with names; and it is one art to discourse, and another to relate and describe; and herein use and action is most conversant.

Also to sum up and contract is a thing in action of very general use.

SHORT NOTES

FOR

CIVIL CONVERSATION.

PREFACE.

THESE notes were first printed—first so far as I know—in the *Remains* (1648): a book of no authority when unsupported by better. No one however who has read Bacon's Essay on *Discourse* will doubt that they are his; and they contain one or two observations not to be found elsewhere. Mr. Montagu says there is a manuscript of them in the British Museum; but he gives a wrong reference; and I regret to say that I cannot supply the right one: for though I feel confident that I have seen them in some manuscript collection, I cannot find it again. In the absence of better authority, I have printed this little piece as I find it in Birch's edition of Bacon's works: who seems to have had some better copy than that in the *Remains*; though I suspect it to be still far from correct.

SHORT NOTES

FOR

CIVIL CONVERSATION.

1. To deceive men's expectations generally with cautel, argueth a staid mind, and unexpected constancy: viz. in matters of fear, anger, sudden joy, or grief, and all things which may affect or alter the mind in public or sudden accidents, or such like.

2. It is necessary to use a steadfast countenance, not wavering with action, as in moving the head or hand too much, which sheweth a fantastical, light, and fickle operation of the spirit, and consequently like mind as gesture: only it is sufficient, with leisure, to use a modest action in either.

3. In all kinds of speech, either pleasant, grave, severe, or ordinary, it is convenient to speak leisurely, and rather drawingly, than hastily; because hasty speech confounds the memory, and oftentimes, besides unseemliness, drives a man either to a non-plus or unseemly stammering, harping upon that which should follow; whereas a slow speech confirmeth the memory, addeth a conceit of wisdom to the hearers, besides a seemliness of speech and countenance.

4. To desire in discourse to hold all arguments, is ridiculous, wanting true judgment; for in all things no man can be exquisite.

5, 6. To have common places to discourse, and to want variety, is both tedious to the hearers, and shows a shallowness of conceit: therefore it is good to vary, and suit speeches with the present occasions; and to have a moderation in all our speeches, especially in jesting of religion, state, great

persons, weighty and important business, poverty, or any thing deserving pity.

7. A long continued speech, without a good speech of interlocution, sheweth slowness: and a good reply, without a good set speech, showeth shallowness and weakness.

8. To use many circumstances, ere you come to the matter, is wearisome; and to use none at all, is but blunt.

9. Bashfulness is a great hindrance to a man, both of uttering his conceit, and understanding what is propounded unto him; wherefore it is good to press himself forwards with discretion, both in speech and company of the better sort.

Usus promptos facit.

APOPHTHEGMS

NEW AND OLD.

PREFACE.

BACON'S collection of Apophthegms, though a sick man's task, ought not to be regarded as a work merely of amusement; still less as a jest-book. It was meant for a contribution, though a slight one, towards the supply of what he had long considered as a desideratum in literature. In the *Advancement of Learning* he had mentioned Apophthegms with respect, along with Orations and Letters, as one of the appendices to Civil History; regretting the loss of Cæsar's collection; "for as for those which are collected by others (he said) either I have no taste in such matters, or their choice hath not been happy."[1] This was in 1605. In revising and enlarging that treatise in 1623, he had spoken of their use and worth rather more fully. "They serve (he said) not for pleasure only and ornament, but also for action and business; being, as one called them, *mucrones verborum*,—speeches with a point or edge, whereby knots in business are pierced and severed. And as former occasions are continually recurring, that which served once will often serve again, either produced as a man's own or cited as of ancient authority. Nor can there be any doubt of the utility in business of a thing which Cæsar the Dictator thought worthy of his own labour; whose collection I wish had been preserved; for as for any others that we have in this kind, but little judgment has in my opinion been used in the selection."[2] Of this serious use of apo-

[1] Vol. III. p. 342.

[2] "Neque apophthegmata ipsa ad delectationem et ornatum tantum prosunt, sed ad res gerendas etiam et usus civiles. Sunt enim (ut alebat ille) veluti *secures* aut *mucrones verborum*; qui rerum et negotiorum nodos acumine quodam secant et penetrant; occasiones autem redeunt in orbem, et quod olim erat commodum rursus adhiberi et prodesse potest, sive quis ea tanquam sua proferat, sive tanquam vetera. Neque certe de utilitate ejus rei ad civilia dubitari potest, quam Cæsar Dictator operâ suâ honestavit; cujus liber utinam extaret, cum ea quæ usquam habentur in hoc genere nobis parum cum delectu congesta videantur."—*De Aug. Sci.* ii. 12.

phthegms Bacon himself had had long experience, having been all his life a great citer of them; and in the autumn of 1624, when he was recovering from a severe illness, he employed himself in dictating from memory a number that occurred to him as worth setting down.

The fate of this collection has been singular. The original edition[1] (a very small octavo volume dated 1625, but published about the middle of December 1624[2]) consisted of 280 apophthegms, with a short preface. Of this volume Dr. Rawley, in the first edition of the *Resuscitatio* (1657), makes no mention whatever, either where he enumerates the works composed during the last five years of Bacon's life, or in the "perfect list of his Lordship's true works both in English and Latin" at the end of the volume. And his words, taken strictly, would seem to imply (since he cannot have been ignorant of its existence) that he did not acknowledge it as Bacon's. But I suppose he had either forgotten it, or did not think it important or original enough to be worth mentioning.

In 1658 there came forth a small volume, without any editor's name, under the following title: *Witty Apophthegms delivered at several times and upon several occasions, by King James, King Charles, the Marquess of Worcester, Francis Lord Bacon, and Sir Thomas Moore. Collected and revised.* In this volume the apophthegms attributed to Bacon are in all 184; of which 163 are copied verbatim from his own collection of 1625, and follow (with one or two slight exceptions, probably accidental) in the same order. The remaining 21, which are mostly of a very inferior character, are not added but interspersed.

In 1661 appeared a second edition, or rather a reissue, of the *Resuscitatio*, edited as before by Dr. Rawley, and with some additions; among which was a collection of "Apophthegms, new and old." This, though introduced without a word of preface or advertisement from editor or publisher, was so far from being a reprint of the original collection of 1625, that I do not think the editor can have had a copy of it to refer to.

[1] *Apophthegmes new and old. Collected by the Right Honourable Francis Lo. Verulam Viscount St. Alban. London. Printed for Hanna Barret and Richard Whittaker, and are to be sold at the King's Head in Paul's Church-yard.* 1625.

A copy in Gray's Inn Library has the date 1626: but appears to be in all other respects exactly the same.

[2] Chamberlain to Carlton, 18 Dec. 1624. Court and Times of James I., ii. p. 486.

'Of the original 280 no less than 71 are entirely omitted; 39 new ones are introduced; the order is totally changed; the text considerably altered. The alterations in the text are indeed (though I think not generally for the better) no more than might have been made by Bacon himself in revising the book. A few of the omissions also might be accounted for in the same way; but very many of the omitted ones are among the best in the volume, and such as he could have no motive for suppressing. Still less is it possible to imagine a reason for the change of *order*, which could hardly have been more complete or more capricious if the leaves of the book had been first separated and then shuffled. Whoever will take a copy of the bound volume and endeavour to write directions in it for any such change in the arrangement, will see that it could not have been done without a great deal of time and trouble. And seeing that it was now more than thirty years since that volume appeared, that it had never been reprinted, nor ever much valued, and (being so small) might easily be lost, the more probable supposition is that Dr. Rawley had no copy of it, and made up his collection from loose and imperfect manuscripts.

In 1671, three or four years after Dr. Rawley's death, appeared a *third* edition of the *Resuscitatio*, in two parts. The first part contains a collection of Apophthegms, which from the publisher's preface one would expect to find a mere reprint from the second edition. But it is in fact a new collection, made up by incorporating the "Witty Apophthegms" of 1658, of which it contains all but 12, with Dr. Rawley's collection of 1661. By this means the number of apophthegms is increased from 248 to 296; the new ones being not added as a supplement, but interspersed among the old. Of the 71 which formed part of Bacon's original collection but not of Dr. Rawley's, 32 are thus supplied. Eight more might have been supplied from the same source, but were left out perhaps by accident. There remained therefore 39 genuine ones still to be recovered; a fact which may be best explained by supposing that the editor of the third edition of the *Resuscitatio* had not been able, any more than Dr. Rawley when he edited the second, to procure a copy of the original volume.

In 1679, a new volume of remains, under the title of *Baconiana*, was published by Dr. Tenison from original manuscripts; with an introduction containing "an account of all the Lord

Bacon's works." In this introduction he tells us (p. 59.) that the best edition of the Apophthegms was the first (1625); and censures as spurious, or at least as including spurious matter, the additions contained in the two collections last mentioned of 1658 and 1671; but of Dr. Rawley's collection in 1661 he strangely enough makes no mention whatever. In the body of the work he gives 27 additional apophthegms, found among Bacon's papers, and never before printed.

Next came Blackbourne, in 1730, with an edition of Bacon's works complete in 4 volumes folio. His plan in dealing with the Apophthegms was to reprint, 1st, the whole collection (repetitions omitted) as it stood in the third edition of the *Resuscitatio;* 2ndly, the 27 additional ones in Tenison's *Baconiana* (all but 3; which he omitted, not very judiciously, because they are to be found in the Essays); 3rdly, the remaining 39, contained in the original edition, but omitted in all later copies. Thus we had for the first time a collection which included *all* the genuine apophthegms. But it was defective in this, — that it included likewise all, or all but one or two, of those which Tenison had alluded to in general terms as spurious; and that no attempt was made in it to distinguish those which had Dr. Rawley's sanction from those which had not.

Succeeding editors followed Blackbourne, without either noticing or trying to remedy this defect; until Mr. Montagu took up the task in his edition of 1825, in which he made an attempt, more laudable than successful, to separate the genuine from the spurious. Taking Tenison's remark as his guide, he reprinted the original collection of 1625 exactly as it stood, (or at least meant to do so; for there are more than 130 places in which his copy differs from the original,) and then added the supplementary collection in the *Baconiana*. The rest he concluded to be spurious, and gathered them (or meant to gather them and thought he had done so) into an appendix, under that title. But in this he took no account of the *second* edition of the *Resuscitatio*, which must certainly be considered as having the sanction of Dr. Rawley; and the principle, whatever it was, upon which he proceeded to eliminate the spurious apophthegms was altogether fallacious. Observing that the last apophthegm in the third edition of the *Resuscitatio* was numbered 308, whereas in the original collection there

were only 280; and *not* observing that of those 308, 12 were given twice over; he seems to have concluded that the number of the spurious must be 28, and that they might be found by simply going through the later collection, and marking off all those which were not given in the earlier. And the first 25 in his spurious list were probably selected in that way; for they are the first 25 (one only excepted, which *is* given in the original collection, and was probably marked off by mistake) which answer the conditions; and they are set down in the order in which to a person so proceeding they would naturally present themselves. Upon what principle he selected the other three which make up the 28, I cannot guess. One of them he has himself printed a few pages before among the genuine; another he quotes in his preface as one which he can hardly believe *not* to be genuine; and before he came to the third, he must, if he took them as they stand in the book, have passed by 20 others which have precisely the same title to the distinction. But howsoever he went about it, his result is certainly wrong; for among his 28 spurious apophthegms there are several which were undoubtedly sanctioned by Dr. Rawley, besides the two which had been previously printed among the genuine ones by himself; and when all is done, there remain no less than 30 others, silently omitted and entirely unaccounted for.

Such is the latest shape in which this little work appears.[1] The common editions contain *all* the apophthegms; but some that are spurious are printed in them as genuine. Mr. Montagu's edition does *not* contain all: and some that are genuine are printed in it as spurious.

I have now to explain the plan upon which I have myself proceeded in order to set the matter right.

First. Considering that the edition of 1625 was published during Bacon's life, with his name on the title-page; that there is no reason for supposing that he revised or altered it afterwards; and that there is some reason for suspecting that the collection published by Dr. Rawley in 1661, far from

[1] This was written before the appearance of Mr. Bohn's volume of the *Moral and Historical Works of Lord Bacon*, edited by Joseph Devey, M.A., which professes to contain the "Apophthegms; omitting those known to be spurious." Of the collection there given however it is not necessary to take any further notice. It is merely a selection from a selection, in which no attempt has really been made to distinguish the spurious from the genuine.

being a revised edition of the former, was made up, when a copy of the original volume was not procurable, from some imperfect manuscript or from old note-books; I regard the 280 apophthegms printed in 1625 as those which we are most certain that Bacon himself thought worth preserving. I begin therefore by reprinting these from the original edition; and so far I follow Mr. Montagu's example.

Secondly. Considering nevertheless that Bacon may *possibly* have revised this collection, and struck out some and altered others; and that Dr. Rawley may possibly have had by him some portions of that revised copy, or some memoranda of those omissions and alterations; I regard the variations as worth preserving.[1] I have therefore compared the two collections, marked with a † all the apophthegms which are not found in the later, and recorded in foot-notes all the more considerable differences of reading that occur in those which are; adding also for convenience of reference the numbers which they bear in the later collection.

Thirdly. Considering that Rawley had access to all Bacon's unpublished papers[2], and had been in constant personal communication with him during his later years; and that Bacon had been in the habit of setting down such things from time to time in note books, and may very likely have made a supplementary collection with a view to publication; I regard all the additional apophthegms which appear in the collection of 1661 as probably genuine, and as resting on authority second only to that which belongs to the original edition. These therefore I reprint from the second edition of the *Resuscitatio*, in the order in which they occur; and for more convenient

[1] The substitution, in almost every case, of "the House of Commons" for "the Lower House" has a kind of historical significance.

[2] In a catalogue of Bacon's extant MSS. (Add. MSS. Brit. Mus. 629. fo. 271.), not dated, but drawn up by Rawley after Bacon's death, I find the three following entries:—

"Apophthegms cast out of my Lord's book, and not printed.
"Apophthegms of K. James.
"Some few apophthegms not chosen."

There is no allusion to any revision of the printed book. The first of these entries evidently refers to some apophthegms which had been struck out of the MS. before it was published; the last probably to some which had not been included in it. The "apophthegms of K. James" may have been the seven which stand first among the additions introduced by Rawley in his collection of 1661. If the MS. from which the collection of 1625 was printed remained in Dr. Rawley's hands, it would not be mentioned in this catalogue, which relates only to what had not been printed. We may easily suppose therefore that some of the loose sheets were still preserved; and that, when the original volume was not procurable, he made up his collection by incorporating these with the unpublished ones mentioned in the catalogue.

reference, with the original numbers affixed. And at the same time, because in a common-place book of Dr. Rawley's which is preserved in the Lambeth Library and appears to have been begun soon after Bacon's death I find several of these additional apophthegms set down in a form somewhat different; and because I think it probable that Dr. Rawley, in preparing them for publication, occasionally introduced variations of his own in order to correct the language or clear the meaning; I have thought the original form worth preserving, and have therefore compared the versions and set down the variations in foot-notes.

Fourthly. Considering that many of Bacon's original papers passed through the hands of Dr. Rawley or his son into those of Dr. Tenison, I regard the supplementary collection in the *Baconiana* as also probably genuine, and next in authenticity to the collection of 1661. These therefore I print next; also preserving in foot-notes such various readings as I find in Dr. Rawley's common-place book above mentioned.

Fifthly. In this same common-place book I find other apophthegms and anecdotes, not included in any of the three collections,—Bacon's, Rawley's, or Tenison's; a few of which I have thought worth preserving; some for their independent value, and some for a little light they throw on Bacon's personal character, manners, or habits. These I print next. They have probably as good a right to be considered genuine as any that were not published by Bacon himself; for they are set down in Rawley's own hand.

Sixthly. When all this is done, there remain 16 which rest upon no better authority than that of the unknown editor of the "Witty Apophthegms." These I regard as having no right to appear at all under Bacon's name, and accordingly remit them to a note, as spurious.

In a note to Bacon's preface, as given in the second edition of the *Resuscitatio*, Dr. Rawley expressly states that the collection was made from memory, "without turning any book." If I am right in conjecturing that the only *collection* made by Bacon himself was that of 1625, we must understand Dr. Rawley's remark as applying to that; and we must beware of attributing to it any great *historical* authority. It will be

found that some of the sayings, especially those of the ancient philosophers, are assigned to the wrong persons. But what is interesting or memorable in them depends in general so little upon the persons who spoke them; and the traditional sayings of famous wits must always be in great part so apocryphal; that I have not thought it worth while to investigate the authorities, or expedient to encumber the text with notes of that kind. The authenticity of the anecdotes relating to persons of more recent times would be better worth investigation; but in these cases Bacon is himself (either as a personal witness or as a preserver of traditions then current) one of the original authorities, whom it would not be easy to correct by a better. In these cases also his memory is less likely to have deceived him.[1] But the whole collection is to be read with this qualification. Dr. Tenison adds that it was one morning's work. But he does not tell us upon what authority; and certainly Dr. Rawley has left no such statement on record. Perhaps he was confounding what Dr. Rawley said of "The beginning of the History of Henry VIII." with what he said about the Apophthegms, and so put the two together. The statement is not to be believed without very good and very express authority.

The use and worth of the collection will be best understood by those who have studied Bacon's own manner of quoting apophthegms, to suggest, illustrate, or enliven serious observations. And it was greater in his time than it is now, not only because they were fresher then and carried more authority in popular estimation, but also because the ingenuities of the understanding were then more affected and in greater request. A similar collection adapted to modern times would be well worth making.

[1] I have however noted two or three cases in which he appears to have relied upon an imperfect recollection of the *Floresta española*; a circumstance which was pointed out to me by Mr. Ellis.

NOTE.

In this edition, where a note is signed R., it means that such is the reading of the *Resuscitatio*, ed. 1661. The numbers within brackets are the numbers by which the several apophthegms are distinguished in that collection. The apophthegms marked † are not contained in it at all.

APOPHTHEGMES

NEW AND OLD.

COLLECTED BY

THE RIGHT HONOURABLE

FRANCIS LO. VERULAM VISCOUNT ST. ALBAN.

LONDON.

Printed for *Hanna Barret* and *Richard Whittaker*, and are to be sold at the King's Head in Paul's Church-yard.

1625.

APOPHTHEGMS NEW AND OLD.

His Lordship's Preface.[1]

JULIUS CÆSAR did write a Collection of Apophthegms, as appears in an epistle of Cicero.[2] I need say no more for the worth of a writing of that nature. It is pity his book[3] is lost: for I imagine they were collected with judgment and choice; whereas that of Plutarch and Stobæus, and much more the modern ones, draw much of the dregs. Certainly they are of excellent use. They are *mucrones verborum, pointed speeches.*[4] Cicero prettily calls them *salinas, saltpits;* that you may extract salt out of, and sprinkle it where you will. They serve to be interlaced in continued speech. They serve to be recited upon occasion of themselves. They serve if you take out the kernel of them, and make them your own. I have, for my recreation in my sickness, fanned the old[5]; not omitting any because they are vulgar, (for many vulgar ones are excellent good,) nor for the meanness of the person, but because they are dull and flat; and added[6] many new, that otherwise would have died.[7]

[1] So R. There is no heading in the original.
[2] So did Macrobius, a Consular man. R.
[3] Cæsar's book. R.
[4] *The words of the wise are as goods,* saith Solomon. (Added in R.)
[5] I have for my recreation, amongst more serious studies, collected some few of them; therein fanning the old. R.
[6] adding. R.
[7] This collection his L^p^ made out of his memory, without turning any book. R. (Note in margin.)

APOPHTHEGMS NEW AND OLD.

†1. When Queen Elizabeth had advanced Ralegh, she was one day playing on the virginals, and my Lo. of Oxford and another nobleman stood by. It fell out so, that the ledge before the jacks was taken away, so as the jacks were seen: My Lo. of Oxford and the other nobleman smiled, and a little whispered: The Queen marked it, and would needs know *What the matter was?* My Lo. of Oxford answered; *That they smiled to see that when Jacks went up Heads went down.*

2. (16.) Henry the Fourth of France his Queen was great[1] with child. Count Soissons, that had his expectation upon the crown, when it was twice or thrice thought that the Queen was with child before, said to some of his friends, *That it was but with a pillow.* This had some ways come to the King's ear; who kept it till when[2] the Queen waxed great; called[3] the Count Soissons to him, and said, laying his hand upon the Queen's belly, *Come, cousin, it is no pillow.*[4] *Yes, Sir,* (answered the Count of Soissons,)[5] *it is a pillow for all France to sleep upon.*

3. (26.) There was a conference in Parliament between the Upper house and the Lower[6], about a Bill of Accountants, which came down from the Lords to the Commons; which bill prayed, that the lands of accountants, whereof they were seized when they entered upon their office, mought be liable to their arrears to the Queen. But the Commons desired that the bill mought not look back to accountants that were already, but extend only to accountants hereafter. But the Lo. Treasurer said, *Why, I pray*[7]*, if you had lost your purse by the way, would you look forwards, or would you look back? The Queen hath lost her purse.*

4. (1.) Queen Elizabeth, the morrow of her coronation, went to the chapel; and in the great chamber, Sir John Rainsford, set on by wiser men, (a knight that had the liberty of a buffone,)

[1] young. R. [2] such time as. R. [3] Then he called. R.
[4] is this a pillow? R. [5] The C. of S. answered, Yes Sir, &c. R
[6] between the Lords' House and the House of Commons. R.
[7] I pray you. R.

besought the Queen aloud; *That now this good time when prisoners were delivered, four prisoners amongst the rest mought likewise have their liberty, who were like enough to be kept still in hold.* The Queen asked; *Who they were?* And he said; *Matthew, Mark, Luke, and John, who had long been imprisoned in the Latin tongue; and now he desired they mought go abroad among the people in English.* The Queen answered, with a grave countenance; *It were good (Rainsford) they were spoken with themselves, to know of them whether they would be set at liberty?*[1]

5. (29.) The Lo. Keeper, Sir Nicholas Bacon, was asked his opinion by Queen Elizabeth of one of these Monopoly Licences. And he answered; *Will you have me speak truth, Madam? Licentiâ omnes deteriores sumus: We are all the worse for a licence.*[2]

6. (206.) Pace, the bitter Fool, was not suffered to come at the Queen[3], because of his bitter humour. Yet at one time some persuaded the Queen that he should come to her; undertaking for him that he should keep compass.[4] So he was brought to her, and the Queen said: *Come on, Pace; now we shall hear of our faults.* Saith Pace; *I do not use to talk of that that all the town talks of.*

7. (30.) My Lo. of Essex, at the succour of Rhoan, made twenty-four knights, which at that time was a great matter.[5] Divers of those gentlemen were of weak and small means; which when Queen Elizabeth heard, she said, *My Lo. mought have done well to have built his alms-house before he made his knights.*

†8. A great officer in France was in danger to have lost his place; but his wife, by her suit and means making, made his peace; whereupon a pleasant fellow said, *That he had been crushed, but that he saved himself upon his horns.*

9. (2.) Queen Anne Bullen, at the time when she was led to

[1] Queen Elizabeth, the morrow of her coronation; (it being the custom to release prisoners at the inauguration of a prince;) went to the Chapel; and in the Great Chamber, one of her courtiers who was well known to her, either out of his own motion, or by the instigation of a wiser man, presented her with a petition; and before a great number of courtiers besought her with a loud voice; *That now this good time there might be four or five principal prisoners more released; those were the four Evangelists and the Apostle Saint Paul, who had been long shut up in an unknown tongue, as it were in prison; so as they could not converse with the common people.* The Queen answered very gravely; *That it was best first to enquire of them, whether they would be released or no.* R.

[2] for licences. R.

[3] at Queen Elizabeth. R.

[4] within compass. R.

[5] number. R.

be beheaded in the Tower, called one of the King's privy chamber to her, and said to him; *Commend me to the King, and tell him he is*[1] *constant in his course of advancing me. From a private gentlewoman he made me a marquisse*[2]*; and from a marquisse*[2] *a queen; and now he had left*[3] *no higher degree of earthly honour, he hath made me a martyr.*[4]

10. (207.) Bishop Latimer said, in a sermon at court; *That he heard great speech that the King was poor and many ways were propounded to make him rich: For his part he had thought of one way, which was, that they should help the King to some good office, for all his officers were rich.*

11. (122.) Cæsar Borgia, after long division between him and the Lords of Romagna, fell to accord with them. In this accord there was an article, that he should not call them at any time all together in person: The meaning was, that knowing his dangerous nature, if he meant them treason, some one mought be free to revenge the rest.[5] Nevertheless he did with such art and fair usage win their confidence, that he brought them all together to counsel at Sinigalia[6]; where he murthered them all. This act, when it was related unto Pope Alexander his father by a Cardinal, as a thing happy, but very perfidious, the Pope said; *It was they that had broke their covenant first, in coming all together.*

12. (54.) Pope Julius the third, when he was made Pope, gave his hat unto a youth, a favourite of his, with great scandal. Whereupon at one time a Cardinal, that mought be free with him, said modestly to him: *What did your Holiness see in that young man, to make him Cardinal?* Julius answered, *What did you see in me, to make me Pope?*

13. (55.) The same Julius, upon like occasion of speech, why he should bear so great affection to the same young man, would say; *That he had found by astrology that it was the youth's destiny to be a great prelate; which was impossible, except himself were Pope; And therefore that he did raise him, as the driver on of his own fortune.*

[1] hath been ever. R.
[2] marchioness. R.
[3] now that he hath left. R.
[4] he intends to crown my innocency with the glory of martyrdom. R.
[5] he mought [q^r. mought not?] have opportunity to oppress them altogether at once. R.
[6] he used such fine art and fair carriage that he won their confidence to meet altogether in counsel at Cinigalia. R.

14. (56.) Sir Thomas Moore had only daughters at the first; and his wife did ever pray for a boy. At last he had a boy; which after, at man's years, proved simple.[1] Sir Thomas said to his wife; *Thou prayedst so long for a boy, that he will be a boy as long as he lives.*

15. (58.) Sir Thomas Moore, the day[2] he was beheaded, had a barber sent to him, because his hair was long, which was thought would make him more commiserable[3] with the people. The barber came to him and asked him, *Whether he would be pleased to be trimmed? In good faith, honest fellow,* (said Sir Thomas,) *the King and I have a suit for my head, and till the title be cleared I will do no cost upon it.*

16. (59.) Stephen Gardiner, Bishop of Winchester, a great champion of the Papists[4], was wont to say of the Protestants, who ground upon the Scripture, *That they were like posts, that bring truth in their letters, and lies in their mouths.*

17. (125.) The Lacedæmonians were besieged by the Athenians in the Fort[5] of Peile; which was won, and some slain and some taken. There was one said to one of them that was taken, by way of scorn, *Were not they brave men that lost their lives at the Fort[1] of Peile?* He answered, *Certainly a Persian arrow is much to be set by, if it can choose out a brave man.*

18. (208.) After the defeat of Cyrus the younger, Falinus was sent by the King to the Grecians, (who had for their part rather victory than otherwise,) to command them to yield their arms. Which when it was denied, Falinus said to Clearchus; *Well then, the King lets you know, that if you remove from the place where you are are now encamped, it is war: if you stay, it is truce. What shall I say you will do?* Clearchus answered, *It pleaseth us as it pleaseth the King. How is that?* saith Falinus. Saith Clearchus, *If we remove, war: if we stay, truce.* And so would not disclose his purpose.

19. (126.) Clodius was acquit by a corrupt jury, that had palpably taken shares of money. Before they gave up their verdict, they prayed of the Senate a guard, that they might do their consciences freely; for Clodius was a very seditious young nobleman. Whereupon all the world gave him for condemned. But acquitted he was. Catulus, the next day, seeing

[1] but simple. R. [2] on the day that. R. [3] commiserated. R.
[4] the Popish religion. R. [5] Port. R. Phyle? or Pylus?

some of them that had acquitted him together, said to them; *What made you to ask of us a guard? Were you afraid your money should have been taken from you?*

20. (127.) At the same judgment, Cicero gave in evidence upon oath: and the jury (which consisted of fifty-seven) passed against his evidence. One day in the Senate, Cicero and Clodius being in altercation, Clodius upbraided him and said: *The jury gave you no credit.* Cicero answered, *Five-and-twenty gave me credit: but there were two-and-thirty that gave you no credit, for they had their money aforehand.*

21. (80.) Many men, especially such as affect gravity, have a manner after other men's speech to shake their heads. Sir Lionel Cranfield would say[1], *That it was as men shake a bottle, to see if there were any wit in their head or no.*

†22. Sir Thomas Moore (who was a man in all his lifetime that had an excellent vein in jesting) at the very instant of his death, having a pretty long beard, after his head was upon the block, lift it up again, and gently drew his beard aside, and said, *This hath not offended the King.*

23. (60.) Sir Thomas Moore had sent him by a suitor in the chancery two silver flagons. When they were presented by the gentleman's servant, he said to one of his men; *Have him to the cellar, and let him have of my best wine.* And turning to the servant, said, *Tell thy master, friend, if he like it, let him not spare it.*

24. (129.) Diogenes, having seen that the kingdom of Macedon, which before was contemptible and low, began to come aloft, when he died, was asked; *How he would be buried?* He answered, *With my face downward; for within a while the world will be turned upside down, and then I shall lie right.*

25. (130.) Cato the elder was wont to say, *That the Romans were like sheep: A man were better drive a flock of them, than one of them.*

26. (201.) Themistocles in his lower fortune was in love with a young gentleman who scorned him. When he grew to his greatness, which was soon after, he sought to him: but Themistocles said; *We are both grown wise, but too late.*

27. Demonax the philosopher, when he died, was asked touching his burial. He answered, *Never take care for burying me, for stink will bury me.* He that asked him, said again:

[1] A great officer of this land would say. R.

Why, would you have your body left to dogs and ravens to feed upon? Demonax answered, *Why, what great hurt is it, if having sought to do good, when I lived, to men, my body do some good to beasts, when I am dead.*

28. Jack Roberts was desired by his tailor, when the reckoning grew somewhat high, to have a bill of his hand. Roberts said; *I am content, but you must let no man know it.* When the tailor brought him the bill, he tore it, as in choler, and said to him; *You use me not well; you promised me nobody should know it, and here you have put in, Be it known unto all men by these presents.*

29. (131.) When Lycurgus was to reform and alter the state of Sparta, in the consultation one advised that it should be reduced to an absolute popular equality. But Lycurgus said to him: *Sir, begin it in your own house.*

†30. Phocion the Athenian, (a man of great severity, and no ways flexible to the will of the people,) one day when he spake to the people, in one part of his speech was applauded: Whereupon he turned to one of his friends, and asked; *What have I said amiss?*

†31. Sir Walter Ralegh was wont to say of the ladies of Queen Elizabeth's privy-chamber and bed-chamber; *That they were like witches; they could do hurt, but they could do no good.*

32. (122.) Bion, that was an atheist, was shewed in a port-city, in a temple of Neptune, many tables or pictures of such as had in tempests made their vows to Neptune, and were saved from shipwrack: and was asked; *How say you now, do you not acknowledge the power of the Gods?* But he said; *Yes, but where are they painted that have been drowned after their vows?*

33. (202.) Bias[1] was sailing, and there fell out a great tempest, and the mariners, that were wicked and dissolute fellows, called upon the Gods; But Bias[1] said to them; *Peace, let them not know ye are here.*

†34. Bion was wont to say; *That Socrates, of all the lovers of Alcibiades, only held him by the ears.*

†35. There was a minister deprived for inconformity, who said to some of his friends; *That if they deprived him, it should cost an hundred men's lives.* The party understood it as if, being a turbulent fellow, he would have moved sedition, and

[1] Bion. R.

complained of him. Whereupon being convented and apposed upon that speech, he said; *His meaning was, that if he lost his benefice, he would practise physic; and then he thought he should kill an hundred men in time.*

36. (61.) Michael Angelo, the famous painter, painting in the Pope's chapel the portraiture of hell and damned souls, made one of the damned souls so like a Cardinal that was his enemy, as everybody at first sight knew it: Whereupon the Cardinal complained to Pope Clement, desiring[1] it might be defaced; Who said to him, *Why, you know very well, I have power to deliver a soul out of purgatory, but not out of hell.*[2]

† 37. There was a philosopher about Tiberius, that looking into the nature of Caius, said of him; *That he was mire mingled with blood.*

38. (209.) Alcibiades came to Pericles, and stayed a while ere he was admitted. When he came in, Pericles civilly excused it, and said; *I was studying how to give my account.* But Alcibiades said to him; *If you will be ruled by me, study rather how to give no account.*

39. (133.) Cicero was at dinner, where there was an ancient lady that spake of her years, and said; *She was but forty years old.* One that sat by Cicero rounded him in the ear, and said; *She talks of forty years old, and she is far more, out of question.* Cicero answered him again; *I must believe her, for I have heard her say so any time these ten years.*

40. (68.) Pope Adrian the sixth was talking with the Duke of Sesa; *That Pasquil gave great scandal, and that he would have him thrown into the river.* But Sesa answered; *Do it not (holy father) for then he will turn frog; and whereas now he chants but by day, he will then chant both by day and night.*[3]

41. (134.) There was a soldier that vaunted before Julius Cæsar of hurts he had received in his face. Julius Cæsar knowing him to be but a coward, told him; *You were best take heed, next time you run away, how you look back.*

† 42. There was a Bishop that was somewhat a delicate person, and bathed twice a day. A friend of his said to him; *My lord, why do you bathe twice a day?* The Bishop answered; *Because I cannot conveniently bathe thrice.*

43. (210.) Mendoza that was vice-roy of Peru, was wont

[1] humbly praying. R.
[2] Melch. I. 1. 5.
[3] See Melchior (Floresta española, de apoteghmas ó sentencias, &c., 1614), I. 1. 3.

to say; *That the government of Peru was the best place that the King of Spain gave, save that it was somewhat too near Madrid.*

† 44. Secretary Bourn's son kept a gentleman's wife in Shropshire, who lived from her husband with him. When he was weary of her, he caused her husband to be dealt with to take her home, and offered him five hundred pounds for reparation. The gentleman went to Sir Henry Sidney, to take his advice upon this offer; telling him; *That his wife promised now a new life; and, to tell him truth, five hundred pounds would come well with him; and besides, that sometimes he wanted a woman in his bed. By my troth,* (said Sir Henry Sidney) *take her home, and take the money; and then whereas other cuckolds wear their horns plain, you may wear yours gilt.*

45. (69.) There was a gentleman in Italy that wrate to a great friend of his, upon his advancement [1] to be Cardinal; *That he was very glad of his advancement, for the Cardinal's own sake; but he was sorry that himself had lost so good a friend.*[2]

† 46. When Rabelais lay on his death-bed, and they gave him the extreme unction, a familiar friend of his came to him afterwards, and asked him; *How he did?* Rabelais answered; *Even going my journey, they have greased my boots already.*

47. (70.) There was a King of Hungary took a Bishop in battle, and kept him prisoner. Whereupon the Pope writ a monitory to him, for that he had broken the privilege of Holy Church, and taken his son. The King sent an embassage to him, and sent withal the armour wherein the Bishop was taken, and this only in writing, *Vide num hæc sit vestis filii tui.*[3]

48. (135.) There was a suitor to Vespasian, who, to lay his suit fairer, said; *It was for his brother;* whereas indeed it was for a piece of money. Some about Vespasian, to cross him, told the Emperor, *That the party his servant spake for was not his brother; but that it was upon a bargain.* Vespasian sent for the party interessed, and asked him; *Whether his mean* [4] *was his brother or no?* He durst not tell untruth to the Emperor, and confessed; *That he was not his brother.* Whereupon the Emperor said, *This do, fetch me the money, and you shall have your suit dispatched.* Which he did. The courtier, which was the

[1] whom the Pope had newly advanced. R.

[2] a good friend. R. Melchior (I. 2. 1.) gives this as written to Cardinal Ximenes on his being made archbishop of Toledo.

[3] *Know now whether this be thy son's coat?* (Added in R.)

[4] his mean employed by him. R.

mean, solicited Vespasian soon after about his suit. *Why,* (saith Vespasian,) *I gave it last day to a brother of mine.*

49. (211.) When Vespasian passed from Jewry to take upon him the empire, he went by Alexandria, where remained two famous philosophers, Apollonius and Euphrates. The Emperor heard them discourse touching matter of state, in the presence of many. And when he was weary of them, he brake off, and in a secret derision, finding their discourses but speculative, and not to be put in practice, said; *O that I might govern wise men, and wise men govern me.*

50. (212.) Cardinal Ximenes, upon a muster which was taken against the Moors, was spoken to by a servant of his to stand a little out of the smoke of the harquebuss; but he said again; *That that was his incense.*[1]

51. (136.) Vespasian asked of Apollonius, *what was the cause of Nero's ruin?* who answered; *Nero could tune the harp well; but in government he did always wind up the strings too high, or let them down too low.*

† 52. Mr. Bromley, Solicitor, giving in evidence for a deed which was impeached to be fraudulent, was urged by the counsel on the other side with this presumption; that in two former suits, when title was made, that deed was passed over in silence, and some other conveyance stood upon. Mr. Justice Catyline taking in with that side, asked the Solicitor, *I pray thee, Mr. Solicitor, let me ask you a familiar question; I have two geldings in my stable, and I have divers times business of importance, and still I send forth one of my geldings, and not the other; would you not think I set him aside for a jade? No, my Lord,* (saith Bromley,) *I would think you spared him for your own saddle.*

53. (45.) Alonso Cartilio was informed by his steward of the greatness of his expence, being such as he could not hold out with. The Bishop asked him; *Wherein it chiefly rose?* His steward told him; *In the multitude of his servants.* The Bishop bad him make a note of those that were necessary, and those that mought be put off.[2] Which he did. And the Bishop taking occasion to read it before most of his servants, said to his steward; *Well, let these remain because I need them; and these other also because they need me.*

[1] Melch. I. 2. 5. where however the occasion is said to have been not the taking a muster against the Moors, but the going to see an altar erected at Madrid, "fuera de la puerta de Moros," and being saluted by the harquebusseers.

[2] spared. R. This is told in Melchior I. 3. 2.

54. (19.) Queen Elizabeth was wont to say, upon the Commission of Sales; *That the commissioners used her like strawberry wives, that laid two or three great strawberries at the mouth of their pot, and all the rest were little ones; so they made her two or three good prices of the first particulars, but fell straightways.*

55. (20.) Queen Elizabeth was wont to say of her instructions to great officers; *That they were like to garments, strait at the first putting on, but did by and by wear loose enough.*

56. (46.) Mr. Marbury the preacher would say; *that God was fain to do with wicked men, as men do with frisking jades in a pasture, that cannot take them up, till they get them at a gate. So wicked men will not be taken up till the hour of death.*

† 57. Thales, as he looked upon the stars, fell into the water; Whereupon it was after said; *That if he had looked into the water he might have seen the stars; but looking up to the stars he could not see the water.*

58. (22.) The book of deposing Richard[1] the second, and the coming in of Henry the fourth, supposed to be written by Dr. Hayward, who was committed to the Tower for it, had much incensed queen Elizabeth. And she asked Mr. Bacon, being then of her learned counsel; *Whether there were no treason contained in it?* Mr. Bacon intending to do him a pleasure, and to take off the Queen's bitterness with a jest[2], answered; *No, madam, for treason I cannot deliver opinion that there is any, but very much felony.* The Queen, apprehending it gladly, asked; *How, and wherein?* Mr. Bacon answered; *Because he had stolen many of his sentences and conceits out of Cornelius Tacitus.*

59. (199.) Mr. Popham[3], when he was Speaker, and the Lower House[4] had sat long, and done in effect nothing; coming one day to Queen Elizabeth, she said to him; *Now, Mr. Speaker, what hath passed in the Lower House?*[5] He answered, *If it please your Majesty, seven weeks.*

60. (47.) Pope Xystus the fifth, who was a poor[6] man's son, and his father's house ill thatched, so that the sun came in in many places, would sport with his ignobility, and say; He was *nato di casa illustre: son of an illustrious house.*

61. (48.) When the King of Spain conquered Portugal, he

[1] King Richard. R.
[2] merry conceit. R.
[3] (afterwards Lord Chief Justice Popham.) R.
[4] House of Commons. R.
[5] Commons' House. R.
[6] very poor. R.

gave special charge to his lieutenant that the soldiers should not spoil, lest he should alienate the hearts of the people. The army also suffered much scarcity of victual. Whereupon the Spanish soldiers would afterwards say; *That they had won the King a kingdom, as the kingdom of heaven useth to be won; by fasting and abstaining from that that is another man's.*

62. (108.) Cicero married his daughter to Dolabella, that held Cæsar's party: Pompey had married Julia, that was Cæsar's daughter. After, when Cæsar and Pompey took arms one against the other, and Pompey had passed the seas, and Cæsar possessed Italy, Cicero stayed somewhat long in Italy, but at last sailed over to join with Pompey; who when he came unto him, Pompey said; *You are welcome; but where left you your son-in-law?* Cicero answered; *With your father-in-law.*

63. (213.) Nero was wont to say of his master Seneca; *That his stile was like mortar of sand without lime.*

64. (240.) Sir Henry Wotton used to say, *That critics are like brushers of noblemen's clothes.*

65. (23.) Queen Elizabeth, being to resolve upon a great officer, and being by some, that canvassed for others, put in some doubt of that person whom she meant to advance, called for Mr. Bacon, and told him; *She was like one with a lanthorn seeking a man;* and seemed unsatisfied in the choice she had of men for that place. Mr Bacon answered her; *That he had heard that in old time there was usually painted on the church walls the Day of Doom, and God sitting in judgement, and St. Michael by him with a pair of balance*[1]*; and the soul and the good deeds in the one balance, and the faults and the evil deeds in the other; and the soul's balance went up far too light: Then was our Lady painted with a great pair of beads, casting them into the light balance, to make up the weight*[2]*: so* (he said) *place and authority, which were in her hands to give, were like our lady's beads, which though men, through divers imperfections, were too light before, yet when they were cast in, made weight competent.*

66. (128.) Mr. Savill[3] was asked by my lord of Essex his opinion touching poets; who[4] answered my lord; *He thought*[5] *them the best writers, next to those that write*[6] *prose.*

†67. Mr. Mason of Trinity college sent his pupil to an-

[1] balances. R.
[2] and brought down the scale. R.
[3] Sir Henry Savill. R.
[4] He. R.
[5] That he thought. R.
[6] writ. R.

other of the fellows, to borrow a book of him; who told him; *I am loth to lend my books out of my chamber; but if it please thy tutor to come and read upon it in my chamber, he shall as long as he will.* It was winter; and some days after, the same fellow sent to Mr. Mason to borrow his bellows; but Mr. Mason said to his pupil; *I am loth to lend my bellows out of my chamber; but if thy tutor would come and blow the fire in my chamber, he shall as long as he will.*

68. (110.) Nero did cut a youth, as if he would have transformed him into a woman [1], and called him *wife.* There was a senator of Rome that said secretly to his friend; *It was pity Nero's father had not such a wife.*

69. (111.) Galba succeeded Nero, and his age being much despised, there was much licence and confusion in Rome. Whereupon a senator said in full senate, *It were better live where nothing is lawful, than where all things are lawful.*

† 70. In Flanders by accident a Flemish tiler fell from the top of a house upon a Spaniard, and killed him, though he escaped himself. The next of the blood prosecuted his death with great violence against the tiler. And when he was offered pecuniary recompence, nothing would serve him but *lex talionis.* Whereupon the judge said to him; *That if he did urge that kind of sentence, it must be, that he should go up to the top of the house, and thence fall down upon the tiler.*

71. (24.) Queen Elizabeth was dilatory enough in suits, of her own nature; and the lord treasurer Burleigh, to feed her humour [2], would say to her; *Madam, you do well to let suitors stay; for I shall tell you, Bis dat, qui cito dat: If you grant them speedily, they will come again the sooner.*

72. (49.) They feigned [3] a tale of Sixtus Quintus [4], that after his death he went to hell; and the porter of hell said to him; *You have some reason to offer yourself to this place* [5]; *but yet* [6] *I have order not to receive you: you have a place of your own, purgatory; you may go thither.* So he went away, and sought purgatory a great while, and could find no such place. Upon that he took heart, and went to heaven, and knocked; and St. Peter asked; *Who was there?* He said, *Sixtus Pope.* Whereunto St. Peter said, *Why do you knock? you have the*

[1] Nero loved a beautiful youth, whom he used viciously. R.
[2] being a wise man, and willing therein to feed her humour. R.
[3] So R. The original has "faigne." [4] whom they called *Size-Ace.* R.
[5] because you were a wicked man. R. [6] But yet, because you were a Pope. R.

keys. Sixtus answered, *It is true; but it is so long since they were given, as I doubt the wards of the lock be altered.*

73. (50.) Charles King of Swede, a great enemy of the Jesuits, when he took any of their colleges, he would hang the old Jesuits, and put the young to his mines, saying; *That since they wrought so hard above ground, he would try how they could work under ground.*

74. (51.) In Chancery, one time, when the counsel of the parties set forth the boundaries of the land in question, by the plot; And the counsel of one part said, *We lie on this side, my lord;* And the counsel of the other part said, *We lie on this side:* the Lord Chancellor Hatton stood up and said, *If you lie on both sides, whom will you have me to believe.*

75. (109.) Vespasian and Titus his eldest son were both absent from Rome when the empire was cast upon him.[1] Domitian his younger son was at Rome, who took upon him the affairs; and being of a turbulent spirit, made many changes, and displaced divers officers and governors of provinces, sending them successors. So when Vespasian came to Rome, and Domitian came into his presence, Vespasian said to him; *Son, I looked when you would have sent me a successor.*

76. (71.) Sir Amice[2] Pawlet, when he saw too much haste made in any matter, was wont to say, *Stay a while, that we may make an end the sooner.*

77. (31.) The deputies of the reformed religion, after the massacre which was[3] upon St. Bartholomew's day, treated with the King and Queen-Mother, and some other of the counsel, for a peace. Both sides were agreed upon the articles. The question was, upon the security of performance.[4] After some particulars propounded and rejected, the Queen-Mother said; *Why, is not the word of a King sufficient security?* One of the deputies answered; *No, by St. Bartholomew, Madam.*

78. (12.) When the Archduke did raise his siege from Grave, the then secretary came to queen Elizabeth; and the Queen, having intelligence first[5], said to the secretary, *Wot you what? The Archduke is risen from the Grave.* He answered, *What, without the trumpet of the Archangel?* The Queen replied; *Yes, without sound of trumpet.*

[1] Vespasian. R.
[2] Amyas. R.
[3] which was at Paris. R.
[4] for the performance. R.
[5] having first intelligence thereof. R.

† 79. Francis the first used for his pleasure sometimes to go disguised. So walking one day in the company of the Cardinal of Bourbon near Paris, he met a peasant with a new pair of shoes upon his arm. So he called him to him and said; *By our lady, these be good shoes, what did they cost thee?* The peasant said; *Guess.* The King said; *I think some five sols.* Saith the peasant; *You have lyed; but a carolois. What villain,* (saith the Cardinal of Bourbon) *thou art dead; it is the King.* The peasant replied; *The devil take him, of you and me, that knew so much.*

80. (217.) There was a conspiracy against the Emperor Claudius by Scribonianus, examined in the senate; where Claudius sat in his chair, and one of his freed servants stood at the back of his chair. In the examination, that freed servant, who had much power with Claudius, very saucily had almost all the words: and amongst other things, he asked in scorn one of the examinates, who was likewise freed servant of Scribonianus; *I pray, sir, if Scribonianus had been Emperor what would you have done?* He answered; *I would have stood behind his chair and held my peace.*

81. (137.) Dionysius the tyrant, after he was deposed, and brought to Corinth, kept a school. Many used to visit him; and amongst others, one, when he came in, opened his mantle and shook his clothes; thinking to give Dionysius a gentle scorn; because it was the manner to do so for them that came in to him while he was tyrant. But Dionysius said to him; *I pray thee do so rather when thou goest out, that we may see thou stealest nothing away.*

82. (241.) Hannibal said of Fabius Maximus and of Marcellus (whereof the former waited upon him, that he could make no progress; and the latter had many sharp fights with him); *that he feared Fabius like a tutor; and Marcellus like an enemy.*

83. (138.) Diogenes, one terrible frosty morning, came into the market-place, and stood naked, quaking, to shew his tolerancy.[1] Many of the people came about him, pitying him. Plato passing by, and knowing he did it to be seen, said to the people, as he went by, *If you pity him indeed, leave him alone.*

84. (72.) Sackford, Master of the Requests[2] to Queen Eliza-

[1] tolerance. R.

[2] A Master of Requests. R. (omitting the name.)

beth, had divers times moved for audience, and been put off. At last he came to the Queen in a progress, and had on a new pair of boots. When he came in, the Queen[1] said to him, *Fie sloven, thy new boots stink. Madam,* (said he,) *it is not my new boots that stink, but it is the stale bills that I have kept so long.*

85. (218.) One was saying; *That his great grandfather and grandfather and father died at sea.* Said another that heard him; *And I were as you, I would never come at sea. Why,* (saith he,) *where did your great grandfather and grandfather and father die?* He answered; *Where but in their beds?* Saith the other; *And I were as you, I would never come in bed.*

86. (139.) Aristippus was earnest suitor to Dionysius for somewhat, who would give no ear to his suit. Aristippus fell at his feet; Then Dionysius granted it. One that stood by said afterwards to Aristippus; *You a philosopher, and to be so base as to throw yourself at the tyrant's feet to get a suit?* Aristippus answered; *The fault is not mine, but the fault is in Dionysius, that carries his ears in his feet.*

† 87. There was a young man in Rome, that was very like Augustus Cæsar. Augustus took knowledge of it, and sent for the man, and asked him; *Was your mother never at Rome?* He answered; *No, sir, but my father was.*

† 88. A physician advised his patient, that had sore eyes, that he should abstain from wine. But the patient said, *I think rather, sir, from wine and water*[2]*; for I have often marked it in blear eyes, and I have seen water come forth, but never wine.*

† 89. When Sir Thomas Moore was Lord Chancellor, he did use, at mass, to sit in the chancel; and his lady in a pew. And because the pew stood out of sight, his gentleman-usher ever after service came to the lady's pew, and said; *Madam, my Lord is gone.* So when the Chancellor's place was taken from him, the next time they went to church, Sir Thomas himself came to his lady's pew, and said; *Madam, my Lord is gone.*

90. (73.) At an act of the Commencement, the answerer gave for his question; *That an aristocracy was better than a monarchy.* The replier, who was a dissolute fellow[3], did tax him; *That being a private bred man, he would give a question of state.* The answerer said; *That the replier did much wrong the*

[1] The Queen who loved not the smell of new leather. R.
[2] So in the original. But I think it should be *from water.*
[3] man. R.

privilege of scholars; who would be much straitened if they should give questions of nothing but such things wherein they are practised. And added; *We have heard yourself dispute of virtue, which no man will say you put much in practice.*

91. (219.) There was a dispute, whether great heads or little heads had the better wit? And one said; *It must needs be the little. For*[1] *it is a maxim, Omne majus continet in se minus.*

92. (140.) Solon, when he wept for his son's death, and one said to him; *Weeping will not help;* answered, *Alas, therefore I weep, because weeping will not help.*

93. (141.) Solon being asked; *Whether he had given the Athenians the best laws?* answered; *Yes, the best of those that they would have received.*

94. (142.) One said to Aristippus; *It is a strange thing, why should men rather give to the poor, than to philosophers.* He answered; *Because they think themselves may sooner come to be poor, than to be philosophers.*

95. (145.) Alexander used to say of his two friends, Craterus and Hephæstion; *That Hephæstion loved Alexander, and Craterus loved the King.*

96. (146.) It fell out so, that as Livia went abroad in Rome, there met her naked young men that were sporting in the streets; which Augustus was[2] about severely to punish in them; but Livia spake for them, and said, *It was no more to chaste women than so many statua's.*

97. (75.) Alonso of Arragon was wont to say, in commendation of age, That age appeared to be best in four things: *Old wood best to burn; old wine to drink; old friends to trust; and old authors to read.*[3]

98. (76.) It was said of Augustus, and afterwards the like was said of Septimius Severus, both which did infinite mischief in their beginnings, and infinite good towards their ends; *That they should either have never been born or never died.*

99. (74.) Queen Isabell[4] of Spain used to say; *Whosoever hath a good presence and a good fashion, carries letters*[5] *of recommendation.*

100. (143.) Trajan would say of the vain jealousy of princes,

[1] For that. R.
[2] went. R.
[3] Melch. H. 1. 20.
[4] Isabella. R.
[5] continual letters. R.

that seek to make away those that aspire to their succession; *That there was never King that did put to death his successor.*

101. (144.) When it was represented to Alexander, to the advantage of Antipater, who was a stern and imperious man, that he only of all his lieutenants wore no purple, but kept the Macedonian habit of black, Alexander said; *Yes, but Antipater is all purple within.*[1]

102. (77.) Constantine the Great, in a kind of envy, himself being a great builder, as Trajan likewise was, would call Trajan *Wall-flower*[2]; because his name was upon so many walls.

103. (147.) Philip of Macedon was wished to banish one for speaking ill of him. But Philip said[3]; *Better he speak where we are both known, than where we are both unknown.*

† 104. A Grecian captain, advising the confederates that were united against the Lacedæmonians touching their enterprise, gave opinion that they should go directly upon Sparta, saying; *That the state of Sparta was like rivers; strong when they had run a great way, and weak towards their head.*

105. (78.) Alonso of Arragon was wont to say of himself, *That he was a great necromancer, for that he used to ask counsel of the dead:* meaning books.[4]

106. (148.) Lucullus entertained Pompey in one of his magnificent houses. Pompey said; *This is a marvellous fair and stately house for the summer: but methinks it should be very cold for winter.* Lucullus answered; *Do you not think me as wise as divers fowl are, to remove with the season?*[5]

107. (149.) Plato entertained some of his friends at a dinner, and had in the chamber a bed or couch, neatly and costly furnished. Diogenes came in, and got upon the bed, and trampled upon it, and said[6]; *I trample upon the pride of Plato.* Plato mildly answered; *But with greater pride.*

† 108. One was examined upon certain scandalous words spoken against the King. He confessed them, and said; *It is true I spake them, and if the wine had not failed I had said much more.*

109. (150.) Pompey being commissioner for sending grain to Rome in time of dearth, when he came to the sea, he found it very tempestuous and dangerous, insomuch as those about

[1] See Mr. Ellis's note, Vol. I. p. 474.
[2] *Paristaria*, wall-flower. R.
[3] answered. R.
[4] of books. R.
[5] to change my habitation in the winter season. R.
[6] and trampled it; saying. R.

him advised him by no means to embark. But Pompey said; *It is of necessity that I go, not that I live.*

†110. Trajan would say; *That the King's exchequer was like the spleen; for when that did swell, the whole body did pine.*

†111. Charles the Bald allowed one, whose name was Scottus, to sit at the table with him, for his pleasure. Scottus sat on the other side of the table. One time the King being merry with him, said to him; *What is there between Scot and Sot?* Scottus answered; *The table only.*

112. (79.) Ethelwold, Bishop of Winchester, in a famine, sold all the rich vessels and ornaments of the Church, to relieve the poor with bread; and said, *There was no reason that the dead temples of God should be sumptuously furnished, and the living temples suffer penury.*

†113. There was a marriage made between a widow of great wealth, and a gentleman of great house that had no estate or means. Jack Roberts said; *That marriage was like a black pudding; the one brought blood, and the other brought suet and oatmeal.*[1]

114. (151.) Demosthenes was upbraided by Æschines, that his speeches did smell of the lamp. But Demosthenes said; *Indeed there is a great deal of difference between that that you and I do by lamp-light.*

115. (152.) Demades the orator, in his age, was talkative, and would eat hard. Antipater would say of him; *That he was like a sacrifice, that nothing was left of it but the tongue and the paunch.*

116. (242.) When King Edward the Second was amongst his torturers, who hurried him to and fro, that no man should know where he was, they set him down upon a bank: and one time, the more to disguise his face, shaved him, and washed him with cold water of a ditch by: The King said; *Well, yet I will have warm water for my beard.* And so shed abundance of tears.

117. (203.) The Turk[2] made an expedition into Persia, and because of the strait jaws of the mountains of Armenia, the basha's consulted which way they should get in. Says a natural fool that stood by[3]; *Here's much ado how you should*[4] *get in; but I hear nobody take care how you should get out.*

[1] Melch. IV. 4. 13.: where the remark is attributed to a nameless Hidalgo, upon a marriage between a rich labourer's daughter and the son of a poor gentleman.
[2] Turks. R. [3] one that heard the debate said. R. [4] shall. R.

118. (220.) Sir Thomas Moore, when the counsel of the party pressed him for a longer day [1], said; *Take Saint Barnaby's day, which is the longest day in the year.* Now Saint Barnaby's day was within few days following.

119. (221.) One of the Fathers saith; *That there is but this difference between the death of old men and young men; that old men go to death, and death comes to young men.*

120. (154.) Philo Judæus saith; *That the sense is like the sun; For the sun seals up the globe of heaven, and opens the globe of earth: so the sense doth obscure heavenly things, and reveal earthly things.*

121. (222.) Cassius, after the defeat of Crassus by the Parthians, whose weapons were chiefly arrows, fled to the city of Carras, where he durst not stay any time, doubting to be pursued and besieged. He had with him an astrologer, who said to him; *Sir, I would not have you go hence, while the moon is in the sign of Scorpio.* Cassius answered, *I am more afraid of that of Sagittarie.*[2]

122. (155.) Alexander, after the battle of Granicum, had very great offers made him by Darius. Consulting with his captains concerning them, Parmenio said; *Sure I would accept of these offers, if I were as Alexander.* Alexander answered; *So would I, if I were as Parmenio.*

123. (156.) Alexander was wont to say; *He knew he was mortal*[3] *by two things; sleep and lust.*

† 124. Augustus Cæsar was invited to supper by one of his old friends that had conversed with him in his less fortunes, and had but ordinary entertainment. Whereupon, at his going, he said; *I did not know you and I were so familiar.*[4]

125. (157.) Augustus Cæsar would say; *That he wondered that Alexander feared he should want work, having no more*[5] *to conquer; as if it were not as hard a matter to keep as to conquer.*

126. (158.) Antigonus, when it was told him that the enemy had such vollies of arrows that they did hide the sun, said; *That falls out well, for it is hot weather, and we shall fight in the shade.*

127. (112.) Augustus Cæsar did write to Livia, who was over-sensible of some ill-words that had been spoken of them

[1] a longer day to perform the decree. R.
[2] *sagittarius.* R.
[3] knew himself to be mortal chiefly. R.
[4] Melch. VI. 8. 14. told of two squires.
[5] no more worlds. R.

both: *Let it not trouble thee, my Livia, if any man speak ill of us; for we have enough, that no man can do ill unto us.*

128. (113.) Chilon said; *That kings' friends and favourites were like casting counters; that sometimes stood for one, sometimes for ten, sometimes for a hundred.*

129. (114.) Theodosius, when he was pressed by a suitor, and denied him, the suitor said; *Why, Sir, you promised it.* He answered; *I said it, but I did not promise it, if it be unjust.*

130. (200.) Agathocles, after he had taken Syracusa, the men whereof, during the seige, had in a bravery spoken of him all the villany that mought be, sold the Syracusans for slaves, and said; *Now if you use such words of me, I will tell your masters of you.*

† 131. Dionysius the elder, when he saw his son in many things very inordinate, said to him; *Did you ever know me do such things?* His son answered; *No, but you had not a tyrant to your father.* The father replied; *No, nor you, if you take these courses, will have a tyrant to your son.*

† 132. Callisthenes the philosopher, that followed Alexander's court, and hated the King, was asked by one; *How one should become the famousest man in the world?* and answered; *By taking away him that is.*

133. (52.) Sir Edward Coke was wont to say, when a great man came to dinner to him, and gave him no knowledge of his coming; *Well, since you sent me no word of your coming, you shall dine with me; but if I had known of your coming*[1], *I would have dined with you.*

134. (115.) The Romans, when they spake to the people, were wont to call[2] them; *Ye Romans.* When commanders in war spake to their army, they called[3] them; *My soldiers.* There was a mutiny in Cæsar's army, and somewhat the soldiers would have had, but they would not declare themselves in it: only they demanded a dimission[4] or discharge, though with no intention it should be granted; but knowing that Cæsar had at that time great need of their service, thought by that means to wrench him to their other desires. Whereupon with one cry they asked dimission.[5] But Cæsar, after silence made, said; *I for my part, ye Romans:* which admitted them[6] to be dismissed. Which voice they had no sooner heard, but they mutined[7] again,

[1] known of it in due time. R.
[2] stile. R.
[3] stiled. R.
[4] but only demanded a mission. R.
[5] mission. R.
[6] This title did actually speak them. R.
[7] mutinied. R.

and would not suffer him to go on[1] until he had called them by the name of *soldiers*. And so with that one word he appeased the sedition.

135. (116.) Cæsar would say of Sylla, for that he did resign his dictatorship; *That he*[2] *was ignorant of letters, he could not dictate.*

136. (117.) Seneca said of Cæsar; *that he did quickly sheath the sword, but never laid it off.*[3]

137. (118.) Diogenes begging, as divers philosophers then used, did beg more of a prodigal man, than of the rest that were present: Whereupon one said to him; *See your baseness, that when you find a liberal mind, you will take most of.*[4] *No,* (said Diogenes,) *but I mean to beg of the rest again.*

138. (223.) Jason the Thessalian was wont to say; *That some things must be done unjustly, that many things may be done justly.*

139. (25.) Sir Nicholas Bacon being Keeper of the Seal[5], when Queen Elizabeth, in progress, came to his house at Redgrave[6], and said to him; *My Lord, what a little house have you gotten?* said[7], *Madam, my house is well, but it is you that have made me too great for my house.*

140. (119.) Themistocles, when an embassador from a mean state did speak great matters, said to him, *Friend, your words would require a city.*

† 141. Agesilaus, when one told him there was one did excellently counterfeit a nightingale, and would have had him hear him, said; *Why I have heard the nightingale herself.*

142. (53.) A great nobleman[8], upon the complaint of a servant of his, laid a citizen by the heels, thinking to bend him to his servant's desire. But the fellow being stubborn, the servant came to his lord, and told him; *Your lordship, I know, hath gone as far as well you may, but it works not; for yonder fellow is more perverse than before.* Said my lord, *Let's forget him a while, and then he will remember himself.*

† 143. One came to a Cardinal in Rome, and told him; *That he had brought his lordship a dainty white palfrey, but he fell lame by the way.* Saith the Cardinal to him; *I'll tell thee what thou shalt do; go to such a Cardinal, and such a Cardinal,* (naming him some half a dozen Cardinals,) *and tell them as much; and so*

[1] to go on with his speech. R.
[2] Sylla. R.
[3] did quickly shew the sword, but never leave it off. R.
[4] of him. R.
[5] who was Keeper of the Great Seal of England. R.
[6] Gorhambury. R.
[7] Answered her. R.
[8] William Earl of Pembroke. R.

whereas by thy horse, if he had been sound, thou couldest have pleased but one, with thy lame horse thou mayest please half a dozen.

144. (120.) Iphicrates the Athenian, in a treaty that he had with the Lacedæmonians for peace, in which question was about security for observing the same [1], said, *The Athenians would not accept of any security, except the Lacedæmonians did yield up unto them those things, whereby it mought be manifest that they could not hurt them if they would.*

† 145. Euripides would say of persons that were beautiful, and yet in some years, *In fair bodies not only the spring is pleasant, but also the autumn.*

146. (81.) After a great fight, there came to the camp of Consalvo, the great captain, a gentleman proudly horsed and armed. Diego de Mendoza asked the great captain; *Who's this?* Who answered; *It is Saint Ermin, who never appears but after a storm.*[2]

† 147. There was a captain sent to an exploit by his general, with forces that were not likely to achieve the enterprize. The captain said to him; *Sir, appoint but half so many. Why?* (saith the general.) The captain answered; *Because it is better fewer die than more.*[3]

148. (121.) They would say of the Duke of Guise, Henry, that had sold and oppignerated all his patrimony, to suffice the great donatives that he had made; *That he was the greatest usurer of France, because all his state was in obligations.*[4]

† 149. Crœsus said to Cambyses; *That peace was better than war; because in peace the sons did bury their fathers, but in wars the fathers did bury their sons.*

150. (224.) There was a harbinger who had lodged a gentleman in a very ill room, who expostulated with him somewhat

[1] the same peace. R.

[2] the storm. R. Compare Melch. II. 3. 3.: where the story is in one respect better told. Consalvo having just disembarked, three ships were seen approaching; "Venia delante in uno dellos un cavallero armado que se avia quedado atrás." A collection of French apophthegms gives it thus: "Le grand Capitaine Gonsalvo voiant venir un sien gentilhomme au devant de lui bien en ordre et richement armé, après la journée de Seriguolle; et que les affaires estoient à seurté; dit à la compagnie: nous ne devons desormais avoir peur de la tourmente. Car Saint Herme nous est apparu."—*Apophthegmata Græca, Latina, Italica, Gallica, Hispanica, collecta a Gerardo Suningro. Leidensi*, 1609.

[3] Melch. II. 3. 12.

[4] They would say of the Duke of Guise, Henry; That he was the greatest usurer in France, for that he had turned all his estate into obligations; meaning that he had sold and oppignorated all his patrimony to give large donatives to other men. R.

rudely; but the harbinger carelessly said; *You will take pleasure in it when you are out of it.*[1]

† 151. There was a curst page, that his master whipt naked; and when he had been whipt, would not put on his clothes and when his master bade him, said to him; *Take them you, for they are the hangman's fees.*

152. (82.) There was one that died greatly in debt. When it was reported in some company, where divers of his creditors were, that he was dead, one began to say; *In good faith*[2], *then he hath carried five hundred ducats of mine with him into the other world.* And another of them said; *And two hundred of mine.* And some others spake of several sums of theirs.[3] Whereupon one that was amongst them said; *Well I see*[4] *now that though a man cannot carry any of his own with him into the other world, yet he may carry other men's.*[5]

153. (83.) Francis Carvajall, that was the great captain of the rebels of Peru, had often given the chase to Diego Centeno, a principal commander of the Emperor's party. He was afterwards taken by the Emperor's lieutenant, Gasca, and committed to the custody of Diego Centeno, who used him with all possible courtesy; insomuch as Carvajall asked him; *I pray, Sir, who are you that use me with this courtesy?* Centeno said; *Do not you know Diego Centeno?* Carvajall answered; *In good faith, Sir*[6], *I have been so used to see your back, as I knew not your face.*

† 154. Carvajall, when he was drawn to execution, being fourscore and five years old, and laid upon the hurdle, said; *What? young in cradle, old in cradle?*

155. (84.) There is a Spanish adage[7], *Love without end*[8] *hath no end:* meaning, that if it were begun not upon particular ends it would last.

156. (159.) Cato the elder, being aged, buried his wife, and married a young woman. His son came to him, and said; *Sir, what have I offended you, that you have brought a step-mother into your house?* The old man answered; *Nay, quite contrary, son; thou pleasest me so well, as I would be glad to have more such.*

[1] Melch. II. 6. 2.; differently told.
[2] well, if he be gone. R.
[3] And a third spake of great sums of his. R.
[4] perceive. R.
[5] into the next world, yet he may carry that which is another man's. R.
[6] Truly, Sir. R.
[7] Gondomar would say. R.
[8] ends. R.

157. (160.) Crassus the orator had a fish, which the Romans called[1] *Muræna*, that he had made very tame and fond of him. The fish died, and Crassus wept for it. One day falling in contention with Domitius in the senate, Domitius said; *Foolish Crassus, you wept for your Muræna.* Crassus replied; *That's more than you did for both your wives.*

158. (161.) Philip, Alexander's father, gave sentence against a prisoner, what time he was drowsy, and seemed to give small attention. The prisoner, after sentence was pronounced, said; *I appeal.* The King somewhat stirred, said; *To whom do you appeal?* The prisoner answered; *From Philip when he gave no ear, to Philip when he shall give ear.*

159. (204.) The same Philip[2] maintained argument with a musician, in points of his art, somewhat peremptorily. But the musician said to him; *God forbid, Sir, your fortune were so hard, that you should know these things better than I.*[3]

160. (162.) There was a philosopher that disputed with Adrian the Emperor, and did it but weakly. One of his friends that had been by, afterwards said to him; *Methinks you were not like yourself, last day, in argument with the Emperor; I could have answered better myself. Why,* said the philosopher, *would you have me contend with him that commands thirty legions?*

† 161. Diogenes was asked in a kind of scorn; *What was the matter, that philosophers haunted rich men, and not rich men philosophers?* He answered; *Because the one knew what they wanted, the other did not.*

† 162. Demetrius, King of Macedon, had a petition offered him divers times by an old woman, and still answered; *He had no leisure.* Whereupon the woman said aloud; *Why then give over to be King.*

163. (225.) The same Demetrius[4] would at times retire himself from business, and give himself wholly to pleasures. One day of those his retirings[5], giving out that he was sick, his father Antigonus came on the sudden to visit him, and met a fair dainty youth coming out of his chamber. When Antigonus came in, Demetrius said: *Sir, the fever left me right now.* Antigonus replied, *I think it was he that I met at the door.*

[1] call. R.
[2] Philip King of Macedon. R.
[3] myself. R.
[4] Demetrius King of Macedon. R.
[5] One of those his retirings. R.

164. (85.) There was a merchant far in debt that died.[1] His goods and household stuff were set forth to sale. There was one that bought only a pillow, and said[2]; *This pillow sure is good to sleep upon, since he could sleep that owed so many debts.*[3]

165. (86.) A lover met his lady in a close chair, she thinking to go[4] unknown. He came and spake to her. She asked him; *How did y u know me?* He said; *Because my wounds bleed afresh.* Alluding to the common tradition, that the wounds of a body slain, in the presence of him that killed him, will bleed afresh.[5]

166. (87.) A gentleman brought music to his lady's window, who[6] hated him, and had warned him oft away; and when he persisted[7], she threw stones at him. Whereupon a friend of his that was in his company, said to him[8]; *What greater honour can you have to your music, than that stones come about you, as they did to Orpheus?*

167. (226.) Cato Major would say; *That wise men learned more by fools, than fools by wise men.*

168. (227.) When it was said to Anaxagoras; *The Athenians have condemned you to die:* he said again; *And Nature them.*

† 169. Demosthenes when he fled from the battle, and that it was reproached to him, said; *That he that flies mought fight again.*

170. (205.) Antalcidas, when an Athenian said to him; *Ye Spartans are unlearned;* said again; *True, for we have learned no evil nor vice of you.*

171. (228.) Alexander, when his father wished him to run for the prize of the race at the Olympian games, (for he was very swift,) said; *He would, if he might run with kings.*

172. (163.) When Alexander passed into Asia, he gave large donatives to his captains, and other principal men of virtue;

[1] There was a merchant died, that was very far in debt. R.
[2] A stranger would needs buy a pillow there, saying. R.
[3] The saying is attributed by Macrobius to Augustus Cæsar; and quoted in Erasmus's collection, No. 31.
[4] to have gone. R.
[5] that the wounds of a body slain will bleed afresh upon the approach of the murtherer. R.
[6] She. R.
[7] would not desist. R.
[8] a gentleman said unto him, that was in his company. R.

insomuch as Parmenio asked him; *Sir, what do you keep for yourself?* He answered; *Hope.*

173. (229.) Antigonus used oft to go disguised, and listen at the tents of his soldiers: and at a time heard some that spoke very ill of him. Whereupon he opened the tent a little, and said to them; *If you will speak ill of me, you should go a little further off.*

174. (164.) Vespasian set a tribute upon urine. Titus his son emboldened himself to speak to his father of it: and represented it as a thing indign and sordid. Vespasian said nothing for the time; but a while after, when it was forgotten, sent for a piece of silver out of the tribute money, and called to his son, bidding him smell to it; and asked him; *Whether he found any offence?* Who said, *No. Why lo*[1], (saith Vespasian again,) *and yet this comes out of urine.*

† 175. There were two gentlemen, otherwise of equal degree, save that the one was of the ancienter house.[2] The other in courtesy asked his hand to kiss: which he gave him; and he kissed it; but said withal, to right himself, by way of friendship; *Well, I and you, against any two of them:* putting himself first.

176. (165.) Nerva the Emperor succeeded Domitian, who was tyrannical; so as[3] in his time many noble houses were overthrown by false accusations; the instruments whereof were chiefly Marcellus and Regulus. The Emperor[4] one night supped privately with some six or seven: amongst which there was one that was a dangerous man, and began to take the like courses as Marcellus and Regulus had done. The Emperor fell into discourse of the injustice and tyranny of the former time, and by name of the two accusers; and said; *What should we do with them, if we had them now?* One of them that were[5] at

[1] Why so. R.

[2] According to Melchior's version (VI. 6. 4,) *mas anciano*: the older man.

[3] who had been tyrannical; and. R. [4] The Emperor Nerva. R.

[5] was. R This variation (which is obviously wrong), coupled with others of the same kind, makes me suspect that the text of the edition of 1661 has suffered from a correcting editor. It may be that he had no choice: for the collection may have been made up from a rough imperfect or illegible copy, containing passages which could only be supplied by conjecture. But it strikes me that very few of these different readings are such as Bacon himself would have thought improvements. In this case the history of the change may be easily divined. "One of them that *were* at supper, and *was* a free-spoken senator," struck the editor as an incorrect sentence: *were* and *was* could not both be right; and as "*a* senator" could not be plural, *were* must be replaced by *was*. Unfortunately, in attending to the grammar without attending to the sense, he in effect puts the remark into the mouth of the very person at whom it was aimed. He should have let *were* stand, and put *who* for *and*.

supper, and was a free-spoken senator, said; *Marry, they should sup with us.*

177. (166.) There was one that found a great mass of money, digged under ground in his grandfather's house. And being somewhat doubtful of the case, signified it to the Emperor that he had found such treasure. The Emperor made a rescript thus; *Use it.* He writ back again, that the sum was greater than his estate or condition could use. The Emperor writ a new rescript thus; *Abuse it.*

178. (198.) A Spaniard was censuring to a French gentleman the want of devotion amongst the French; in that, whereas in Spain, when the Sacrament goes to the sick, any that meets with it turns back and waits upon it to the house whither it goes; but in France they only do reverence, and pass by. But the French gentleman answered him; *There is reason for it; for here with us Christ is secure amongst his friends; but in Spain there be so many Jews and Maranos, that it is not amiss for him to have a convoy.*

179. (88.) Coranus the Spaniard, at a table at dinner, fell into an extolling of his own father, and said; *If he could have wished of God, he could not have chosen amongst men a better father.* Sir Henry Savill said, *What, not Abraham?* Now Coranus was doubted to descend of a race of Jews.

180. (89.) Consalvo would say; *The honour of a soldier ought to be of a good strong web;* meaning, that it should not be so fine and curious, that every little disgrace should[1] catch and stick in it.

181. (243.) One of the Seven was wont to say; *That laws were like cobwebs; where the small flies were caught, and the great brake thorough.*

† 182. Bias gave in precept; *Love as if you should hereafter hate; and hate as if you should hereafter love.*

183. (169.) Aristippus being reprehended of luxury by one that was not rich, for that he gave six crowns for a small fish, answered; *Why what would you have given?* The other said; *Some twelve pence.* Aristippus said again; *And six crowns is no more with me.*

184. (32.) There was a French gentleman speaking with an English, of the law Salique; that women were excluded to

[1] as for every small disgrace to. R.

inherit[1] the crown of France. The English said; *Yes, but that was meant of the women themselves, not of such males as claimed by women.* The French gentleman said; *Where do you find that gloss?* The English answered; *I'll tell you, Sir: look on the backside of the record of the law Salique, and there you shall find it indorsed:* meaning[2] there was no such thing at all as the law Salique, but that it was a fiction.[3]

185. (33.) There was a friar in earnest dispute[4] about the law Salique, that would needs prove it by Scripture; citing that verse of the Gospel; *Lilia agri non laborant neque nent: which is as much as to say* (saith he) *that*[5] *the flower-de-luces of France cannot descend neither to distaff nor spade: that is, not to a woman, nor to a peasant.*

186. (167.) Julius Cæsar, as he passed by, was by acclamation of some that were suborned called[6] *King*, to try how the people would take it. The people shewed great murmur and distaste at it. Cæsar, finding where the wind stood, slighted it, and said; *I am not King, but Cæsar;* as if they had mistook[7] his name. For *Rex* was a surname amongst the Romans, as *King* is with us.

187. (168.) When Crœsus, for his glory, shewed Solon great treasure[8] of gold, Solon said to him; *If another come*[9] *that hath better iron than you, he will be master of all this gold.*

188. (99.) There was a gentleman that came to the tilt all in orange-tawny, and ran very ill. The next day he came[10] all in green, and ran worse. There was one of the lookers on asked another; *What's the reason that this gentleman changeth his colours?* The other answered *Sure, because it may be reported that the gentleman in the green ran worse than the gentleman in the orange-tawny.*

189. (230.) Aristippus said; *That those that studied particular sciences, and neglected philosophy, were like Penelope's wooers, that made love to the waiting women.*[11]

190. (170.) Plato reproved[12] severely a young man for entering into a dissolute house. The young man said to him; *What*[13]

[1] from inheriting. R. [2] implying. R. [3] is a mere fiction. R.
[4] A friar of France being in an earnest dispute. R.
[5] *The lilies of the field do neither labour nor spin:* applying it thus, that. R.
[6] of some that stood in the way, termed. R. [7] mistaken. R
[8] his great treasures. R. [9] if another KING come. R. [10] came again. R
[11] woman. R. [12] reprehended. R. [13] why do you reprehend me so sharply. R

for so small a matter? Plato replied; *But custom is no small matter.*

191. (190.) There was a law made by the Romans against the bribery and extortion of the governors of provinces. Cicero saith, in a speech of his to the people; *That he thought the provinces would petition to the state of Rome to have that law repealed. For* (saith he) *before the governors did bribe and extort as much as was sufficient for themselves; but now they bribe and extort as much as may be enough not only for themselves, but for the judges and jurors and magistrates.*

192. (171.) Archidamus King of Lacedæmon, having received from Philip King of Macedon, after Philip had won the victory of Chæronea upon the Athenians, proud letters, writ back to him; *That if he measured his own shadow, he would find it no longer than it was before his victory.*

193. (172.) Pyrrhus, when his friends congratulated to him his victory over the Romans, under the conduct of Fabricius, but with great slaughter of his own side, said to them again; *Yes, but if we have such another victory, we are undone.*

194. (173.) Cineas was an excellent orator and statesman, and principal friend and counsellor to Pyrrhus; and falling in inward talk with him, and discerning the King's endless ambition[1], Pyrrhus opened himself to him; *That he intended first a war upon Italy*[2], *and hoped to atchieve it.* Cineas asked him; *Sir, what will you do then? Then* (saith he) *we will attempt Sicily.*[3] Cineas said; *Well, Sir, what then? Then* (saith Pyrrhus) *if the Gods favour*[4] *us, we may conquer Africk and Carthage.*[5] *What then, Sir?* saith Cineas. *Nay then* (saith Pyrrhus) *we may take our rest, and sacrifice and feast every day, and make merry with our friends. Alas, Sir,* (said Cineas) *may we not do so now, without all this ado?*

195. (231.) The embassadors of Asia Minor came to Antonius, after he had imposed upon them a double tax, and said plainly to him; *That if he would have two tributes in one year, he must give them two seed-times and two harvests.*

196. (174.) Plato was wont to say of his master Socrates;

[1] when Pyrrhus. R. [2] Sicily. R. [3] Italy and Rome. R. [4] succour. R. [5] we may conquer the kingdom of Carthage. R. Compare Erasmus's version of this anecdote (*V. Pyrrh.* 24.), from which it seems to be compressed: where the order of the proposed conquests is Rome, Italy, Sicily, Libya and Carthage, Macedonia and Greece.

That he was like the apothecaries' gally-pots; that had on the outside apes, and owls, and satyrs; but within precious drugs.[1]

†197. Lamia the courtezan had all power with Demetrius King of Macedon; and by her instigations he did many unjust and cruel acts. Whereupon Lysimachus said; *That it was the first time that ever he knew a whore play in a tragedy.*

†198. Themistocles would say of himself; *That he was like a plane-tree, that in tempests men fled to him, and in fair weather men were ever cropping his leaves.*

†199. Themistocles said of speech; *That it was like Arras, that spread abroad shews fair images, but contracted is but like packs.*

200. (90.) Brisquet[2], jester to Francis the first of France, did keep a calendar of fools, wherewith he did use to make the King sport; telling him ever the reason why he put every one[3] into his calendar. So when Charles the fifth passed, upon confidence of the noble nature of Francis, thorough France, for the appeasing of the rebellion of Gaunt, Brisquet put him into his calendar. The King asking the cause, he said[4]: *Because you having suffered at the hands of Charles the greatest bitterness that ever prince did from other*[5], *he would trust his person into your hands. Why, Brisquet,* (said the King) *what wilt thou say, if thou seest him pass*[6] *in as great safety as if it were*[7] *thorough the midst of Spain?* Saith Brisquet; *Why then I will put out him, and put in you.*[8]

201. (245.) Lewis the eleventh of France, having much abated the greatness and power of the Peers, Nobility, and Court of Parliament, would say; *That he had brought the Crown out of ward.*

202. (57.) Sir Fulke Grevill[9], in Parliament, when the Lower House in a great business of the Queen's[10], stood much upon precedents, said unto them; *Why should you stand so much upon precedents? The times hereafter will be good or bad: If good, precedents will do no harm; if bad, power will make a way where it finds none.*

[1] See Vol. I. p. 448. note 2. [2] Bresquet. R. [3] any one. R.
[4] asked him the cause? He answered. R.
[5] another, nevertheless. R. [6] pass back. R. [7] he marched. R.
[8] Compare Melch. I 3. 1., where a different story with a similar point is told of Alonso Carrillo and one of his servants.
[9] afterward Lord Brooke. R.
[10] when the House of Commons in a great business stood, &c. R.

203. (34.) When peace was renewed with the French in England, divers of the great counsellors were presented from the French with jewels. The Lord Henry Howard[1] was omitted. Whereupon the King said to him; *My Lord, how haps it that you have not a jewel as well as the rest?* My Lord answered again, (alluding[2] to the fable in Æsop;) *Non sum Gallus, itaque non reperi gemmam.*

204. (232.) An orator of Athens said to Demosthenes; *The Athenians will kill you, if they wax mad.* Demosthenes replied, *And they will kill you, if they be in good sense.*

205. (175.) Alexander sent to Phocion a great present of money. Phocion said to the messenger; *Why doth the King send to me and to none else?* The messenger answered; *Because he takes you to be the only good man in Athens.* Phocion replied; *If he think so, pray let him suffer me to be good still.*[3]

206. (92.) Cosmus duke of Florence was wont to say of perfidious friends; *That we read that we ought to forgive our enemies; but we do not read that we ought to forgive our friends.*

207. (102.) Æneas Sylvius, that was Pius Secundus[4], was wont to say; *That the former Popes did wisely to set the lawyers on work*[5] *to debate, whether the donation of Constantine the Great to Sylvester*[6] *were good and valid in law or no? the better to skip over the matter in fact, whether there were*[7] *any such thing at all or no?*

208. (176.) At a banquet, where those that were called the Seven Wise Men of Greece were invited by the embassador of a barbarous King, the embassador related, That there was a neighbour King, mightier than his master, picked quarrels with him, by making impossible demands, otherwise threatening war; and now at that present had demanded of him to drink up the sea. Whereunto one of the Wise Men said; *I would have him undertake it. Why* (saith the embassador) *how shall he come off? Thus,* (saith the Wise Man:) *Let that King first stop the rivers that run into the sea, which are no part of the bargain, and then your master will perform it.*

209. (177) At the same banquet, the embassador desired

[1] being then Earl of Northampton and a Counsellor. R.
[2] answered, according to, &c. R.
[3] to be so still. R.
[4] Pope Pius Secundus. R.
[5] awork. R.
[6] of St. Peter's patrimony. R.
[7] was ever. R.

the Seven, and some other wise men that were at the banquet, to deliver every one of them some sentence or parable, that he mought report to his King the wisdom of Græcia. Which they did. Only one was silent. Which the embassador perceiving, said to him; *Sir, let it not displease you, why do not you say somewhat that I may report?* He answered, *Report to your lord, that there are of the Grecians that can hold their peace.*

† 210. One of the Romans said to his friend; *What think you of such an one as was taken with the manner in adultery?* The other answered; *Marry, I think he was slow at dispatch.*

† 211. Lycurgus would say of divers of the heroes of the heathen; *That he wondered that men should mourn upon their days for them as mortal men, and yet sacrifice to them as gods.*

212. (93.) A Papist being opposed by a Protestant, that they had no Scripture for images, answered; *Yes; for you read that the people laid their sick in the streets, that the shadow of Saint Peter mought come upon them; and that a shadow was an image; and the obscurest of images.*[1]

† 213. There is an ecclesiastical writer of the Papists, to prove antiquity of confession in the form that it now is, doth note, that in very ancient times, even in the primitive times, amongst other foul slanders spread against the Christians, one was; *That they did adore the genitories of their priests. Which* (he saith) *grew from the posture of the confessant and the priest in confession: which is, that the confessant kneels down, before the priest sitting in a raised chair above him.*

† 214. Epaminondas, when his great friend and colleague in war was suitor to him to pardon an offender, denied him. Afterwards, when a concubine of his made the same suit, he granted it to her; which when Pelopidas seemed to take unkindly, he said; *Such suits are to be granted to whores, but not to personages of worth.*

215. (178.) The Lacedæmonians had in custom to speak very short. Which, being in empire[2], they mought do at pleasure. But after their defeat at Leuctra, in an assembly of the Grecians, they made a long invective against Epaminondas; who stood up, and said no more but this; *I am glad we have taught you to speak long.*

† 216. Fabricius, in conference with Pyrrhus, was tempted to

[1] of all images. R.

[2] being an empire. R.

revolt to him; Pyrrhus telling him, that he should be partner of his fortunes, and second person to him. But Fabricius answered, in a scorn, to such a motion; *Sir, that would not be good for yourself: for if the Epirotes once knew me, they will rather desire to be governed by me than by you.*

217. (179.) Fabius Maximus being resolved to draw the war in length, still waited upon Hannibal's progress to curb him; and for that purpose he encamped upon the high grounds. But Terentius his colleague fought with Hannibal, and was in great peril of overthrow. But then Fabius came down[1] the high grounds, and got the day: Whereupon Hannibal said; *That he did ever think that that same cloud that hanged upon the hills, would at one time or other give a tempest.*

218. (246.) There was a cowardly Spanish soldier, that in a defeat the Moors gave, ran away with the foremost. Afterwards, when the army generally fled, this soldier was missing. Whereupon it was said by some, that he was slain. *No sure,* (saith one) *he is alive; for the Moors eat no hare's flesh.*[2]

219. (180.) Hanno the Carthaginian was sent commissioner by the state, after the second Carthaginian war, to Rome[3], to supplicate for peace, and in the end obtained it. Yet one of the sharper senators said; *You have often broken with us the peaces whereunto you have been sworn; I pray, by what Gods will you swear?* Hanno answered; *By the same Gods that have punished the former perjury so severely.*

† 220. Thales being asked when a man should marry, said; *Young men not yet, old men not at all.*

† 221. Thales said; *That life and death were all one.* One that was present asked him; *Why do not you die then?* Thales said again; *Because they are all one.*

222. (181.) Cæsar after first he had[4] possessed Rome, Pompey being fled, offered to enter the sacred treasury, to take the moneys that were there stored. Metellus, tribune of the people, did forbid him. And when Metellus was violent in it, and would not desist, Cæsar turned to him, and said; *Presume no further, or I will lay you dead.* And when Metellus was with those words somewhat astonished, Cæsar added; *Young man, it had been easier for me to do this than to speak it.*

† 223. An Ægyptian priest having conference with Solon,

[1] down from. R.
[2] Melch. II. 3. 21.
[3] R. omits "to Rome."
[4] when he had first. R.

said to him; *You Grecians are ever children; you have no knowledge of antiquity, nor antiquity of knowledge.*

224. (14.) The counsel did make remonstrance unto Queen Elizabeth of the continual conspiracies against her life; and namely of a late one: and shewed her a rapier, taken from a conspirator, that had a false chape, being of brown paper, but gilt over, as it could not be known from a chape of metal; which was devised to the end that without drawing the rapier mought give a stab; and upon this occasion advised her [1] that she should go less abroad to take the air, weakly accompanied, as she used. But the Queen answered; *That she had rather be dead, than put in custody.*

225. (194.) Chilon would say, *That gold was tried with the touchstone, and men with gold.*

226. (101.) Zelim was the first of the Ottomans that did shave his beard, whereas his predecessors wore it long. One of his Basha's asked him; *Why he altered the custom of his predecessors?* He answered; *Because you Basha's shall not lead me by the beard, as you did them.*

† 227. Diogenes was one day in the market-place, with a candle in his hand; and being asked; *What he sought?* he said; *He sought a man.*

† 228. Bias being asked; *How a man should order his life?* answered; *As if a man should live long, or die quickly.*

† 229. Queen Elizabeth was entertained by my Lord Burleigh at Theobalds: and at her going away, my Lord obtained of the Queen to make seven knights. They were gentlemen of the country, of my Lord's friends and neighbours. They were placed in a rank, as the Queen should pass by the hall; and to win antiquity of knighthood, in order, as my Lord favoured; though indeed the more principal gentlemen were placed lowest. The Queen was told of it, and said nothing; but when she went along, she passed them all by, as far as the screen, as if she had forgot it: and when she came to the screen, she seemed to take herself with the manner, and said; *I had almost forgot what I promised.* With that she turned back, and knighted the lowest first, and so upward. Whereupon Mr. Stanhope, of the privy-chamber, a while after told her: *Your Majesty was too fine for*

[1] and namely, that a man was lately taken who stood ready in a very dangerous and suspicious manner to do the deed; and they shewed her the weapon wherewith he thought to have acted it, and therefore they advised her, &c. R.

my Lord Burleigh. She answered; *I have but fulfilled the Scripture; The first shall be last, and the last first.*

230. (195.) Simonides being asked of Hiero; *What he thought of God?* asked a seven-night's time to consider of it. And at the seven-night's end he asked a fortnight's time. At the fortnight's end, a month. At which Hiero marvelling, Simonides answered; *That the longer he thought on it*[1], *the more difficult he found it.*

231. (248.) Anacharsis would say concerning the popular estates of Græcia; *That he wondered how at Athens wise men did propose, and fools did dispose.*

† 232. Solon compared the people unto the sea, and orators to the winds: *For that the sea would be calm and quiet, if the winds did not trouble it.*

233. (197.) Socrates was pronounced by the oracle of Delphos to be the wisest man of Greece; which he would put from himself, ironically[2] saying; *There could be nothing in him*[3] *to verify the oracle, except this; that he was not wise, and knew it; and others were not wise, and knew it not.*

234. (238.) Cato the elder, what time many of the Romans had statua's erected in their honour, was asked by one in a kind of wonder; *Why he had none?* and answered; *He had much rather men should ask and wonder why he had no statua, than why he had a statua.*

† 235. Sir Fulke Grevill had much and private access to Queen Elizabeth, which he used honourably, and did many men good; yet he would say merrily of himself; *That he was like Robin Goodfellow; For when the maids spilt the milkpans, or kept any racket, they would lay it upon Robin; So what tales the ladies about the Queen told her, or other bad offices that they did, they would put it upon him.*

236. (196.) Socrates, when there was shewed him[4] the book of Heraclitus the Obscure, and was asked his opinion of it, answered; *Those things that I understood were excellent; I imagine, so were those that I understood not; but they require a diver of Delos.*

† 237. Bion asked an envious man that was very sad; *What harm had befallen to him, or what good had befallen to another man?*

[1] thought upon the matter. R.
[2] put from himself in modesty. R.
[3] in himself. R.
[4] unto him. R.

† 238. Stilpo the philosopher, when the people flocked about him, and that one said to him; *The people come wondering about you, as if it were to see some strange beast. No,* (saith he) *it is to see a man which Diogenes sought with his lanthorn.*

239. (184.) Antisthenes being asked of one; *What learning was most necessary for man's life?* answered; *To unlearn that which is naught.*

† 240. There was a politic sermon, that had no divinity in it, was preached before the King. The King, as he came forth, said to Bishop Andrews; *Call you this a sermon?* The Bishop answered; *And it please your majesty, by a charitable construction, it may be a sermon.*

241. (103.) Bishop[1] Andrews was asked at the first coming over of the Bishop[2] of Spalato; *Whether he were a Protestant or no?* He answered; *Truly I know not, but he is a Detestant, of divers opinions of Rome.*[3]

242. (182.) Caius Marius was general of the Romans against the Cimbers, who came with such a sea of multitude[4] upon Italy. In the fight, there was a band of the Cadurcians, of a thousand, that did notable service. Whereupon, after the fight, Marius did denizen them all for citizens of Rome, though there was no law to warrant it. One of his friends did represent[5] it unto him, that he had transgressed the law, because that privilege was not to be granted but by the people. Whereto Marius answered; *That for the noise of arms he could not hear the laws.*

243. (105.) Æneas Sylvius would say; *That the Christian faith and law, though it had not been confirmed by miracles, yet was worthy to be received for the honesty thereof.*

† 244. Henry Noel would say; *That courtiers were like fasting-days; They were next the holydays, but in themselves they were the most meagre days of the week.*

245. (106.) Mr. Bacon would say; *That it was in business, as it is commonly*[6] *in ways; that the next way is commonly the foulest, and that if a man will go the fairest way, he must go somewhat about.*

246. (215.) Augustus Cæsar, out of great indignation against his two daughters, and Posthumus Agrippa, his grandchild,

[1] The Lord Bishop. R. [2] Archbishop. R.
[3] *but I think he is a Detestant:* That was, of most of the opinions of Rome. R.
[4] such a sea of people. R. [5] present. R. [6] frequently. R.

whereof the first two were infamous, and the last otherwise unworthy, would say; *That they were not his seed, but some imposthumes that had broken from him.*

† 247. Cato said; *The best way to keep good acts in memory, was to refresh them with new.*

248. (183.) Pompey did consummate the war against Sertorius, when Metellus had brought the enemy somewhat low. He did also consummate the war against the fugitives, whom Crassus had before defeated in a great battle. So when Lucullus had had great and glorious victories against Mithridates and Tigranes, yet Pompey, by means his friends made, was sent to put an end to that war. Whereupon Lucullus, taking indignation, as a disgrace offered to himself, said; *That Pompey was a carrion crow, that when others had strucken down bodies, he came to prey upon them.*[1]

249. (186.) Diogenes, when mice came about him as he was eating, said; *I see that even Diogenes nourisheth parasites.*

250. (233.) Epictetus used to say; *That one of the vulgar, in any ill that happens to him, blames others; a novice in philosophy blames himself; and a philosopher blames neither the one nor the other.*

251. (187.) Hiero visited by Pythagoras, asked him; *Of what condition he was?* Pythagoras answered; *Sir, I know you have been at the Olympian games. Yes,* saith Hiero. *Thither* (saith Pythagoras) *come some to win the prizes. Some come to sell their merchandize, because it is a kind of mart of all Greece. Some come to meet their friends, and make merry, because of the great confluence of all sorts. Others come only to look on. I am one of them that come to look on.* Meaning it of philosophy, and the contemplative life.

252. (107.) Mr. Bettenham[2] used to say; *That riches were like muck; when it lay upon an heap, it gave but a stench and ill odour; but when it was spread upon the ground, then it was cause of much fruit.*

253. (96.) The same Mr. Bettenham said; *That virtuous men were like some herbs and spices, that give not*[3] *their sweet smell, till they be broken and crushed.*

254. (98.) There was a painter became a physician. Where-

[1] then Pompey came and preyed upon them. R.
[2] Reader of Gray's Inn. R.
[3] give not out. R.

upon one said to him; *You have done well; for before the faults of your work were seen, but now they are unseen.*[1]

255. (189.) One of the philosophers was asked; *What a wise man differed from a fool?* He answered; *Send them both naked to those that know them not, and you shall perceive.*

256. (234.) Cæsar in his book that he made against Cato (which is lost) did write, to shew the force of opinion and reverence of a man that had once obtained a popular reputation; *That there were some that found Cato drunk, and they were ashamed instead of Cato.*

257. (191.) Aristippus, sailing in a tempest, shewed signs of fear. One of the seamen said to him, in an insulting manner; *We that are plebeians are not troubled; you, that are a philosopher, are afraid.* Aristippus answered; *There is not the like wager upon it, for me to perish and you.*[2]

258. (192.) There was an orator that defended a cause of Aristippus, and prevailed. Afterwards he asked Aristippus; *Now, in your distress, what did Socrates do you good?* Aristippus answered; *Thus; in making true that good which you said of me.*[3]

† 259. Aristippus said; *He took money of his friends, not so much to use it himself, as to teach them how to bestow their money.*

† 260. A strumpet said to Aristippus; *That she was with child by him.* He answered; *You know that no more, than if you went through a hedge of thorns, you could say, This thorn pricked me.*

261. (15.) The lady Paget, that was very private with Queen Elizabeth, declared herself much against her match[4] with Monsieur. After Monsieur's death, the Queen took extreme grief (at least as she made shew), and kept[5] within her bedchamber and one antechamber for three weeks space, in token of mourning. At last she came forth into her privy chamber, and admitted her ladies to have access unto her; and amongst the rest my lady Paget presented herself, and came to her with a smiling countenance. The Queen bent her brows, and seemed to be highly displeased, and said to her; *Madam, you*

[1] Compare Melch. IV. 7. 5., where the remark is represented more gracefully as made by the painter himself.

[2] for you to perish and for me. R.

[3] in making that which you said of me to be true. R.

[4] the match. R.

[5] kept in. R.

are not ignorant of my extreme grief, and do you come to me with a countenance of joy? My lady Paget answered; *Alas, and it please your Majesty, it is impossible for me to be absent from you three weeks, but that when I see you I must look cheerfully. No, no,* (said the Queen, not forgetting her former averseness from[1] the match), *you have some other conceit in it; tell me plainly.* My lady answered; *I must obey you. It is this. I was thinking how happy your Majesty was, in that you married not Monsieur; for seeing you take such thought for his death, being but your friend, if he had been your husband, sure it would have cost you your life.*

262. (94.) Sir Edward Dyer, a grave and wise gentleman, did much believe in Kelley the alchymist; that he did indeed the work, and made gold: insomuch as he went himself into Germany, where Kelley then was, to inform himself fully thereof. After his return, he dined with my Lord of Canterbury, where at that time was at the table Dr. Browne, the physician. They fell in talk of Kelley. Sir Edward Dyer, turning to the Archbishop, said; *I do assure your Grace, that that I shall tell you is truth. I am an eye-witness thereof, and if I had not seen it, I should not have believed it. I saw Master Kelley put of the base metal into the crucible, and after it was set a little upon the fire, and a very small quantity of the medicine put in, and stirred with a stick of wood, it came forth in great proportion perfect gold, to the touch, to the hammer, to the test.* Said the Bishop[2]; *You had need take heed what you say, Sir Edward Dyer, for here is an infidel at the board.* Sir Edward Dyer said again pleasantly; *I would have looked for an infidel sooner in any place than at your Grace's table. What say you, Dr. Browne?* saith the Bishop.[3] Dr. Browne answered, after his blunt and huddling manner, *The gentleman hath spoken enough for me. Why* (saith the Bishop[4]) *what hath he said? Marry,* (saith Dr. Browne) *he said he would not have believed it except he had seen it; and no more will I.*

† 263. Democritus said; *That truth did lie in profound pits, and when it was got, it needed much refining.*

264. (95.) Doctor Johnson said; *That in sickness there were three things that were material; the physician, the disease, and the patient. And if any two of these joined, then they have*[5] *the victory. For, Ne Hercules quidem contra duos. If the phy-*

[1] to. R. [2] My Lord Archbishop said. R. [3] said the Archbishop. R.
[4] Archbishop. R. [5] get. R.

sician and the patient join, then down goes the disease; for the patient recovers. If the physician and the disease join, then down goes the patient; that is where the physician mistakes the cure.[1] *If the patient and the disease join, then down goes the physician; for he is discredited.*

265. (185.) Alexander visited Diogenes in his tub. And when he asked him; *What he would desire of him?* Diogenes answered; *That you would stand a little aside, that the sun may come to me.*

† 266. Diogenes said of a young man that danced daintily, and was much commended; *The better, the worse.*

267. (236.) Diogenes called an ill musician, *Cock. Why?* (saith he.) Diogenes answered; *Because when you crow men use to rise.*

268. (188.) Heraclitus the Obscure said; *The dry light was the best soul.* Meaning, when the faculties intellectual are in vigour, not wet, nor[2], as it were, blooded by the affections.

† 269. There was in Oxford a cowardly fellow that was a very good archer. He was abused grossly by another, and moaned himself to Walter Ralegh, then a scholar, and asked his advice; *What he should do to repair the wrong had been offered him?* Ralegh answered; *Why, challenge him at a match of shooting.*

270. (100.) Whitehead, a grave divine, was much esteemed by Queen Elizabeth, but not preferred, because he was against the government of Bishops. He was of a blunt stoical nature.[3] He came one day to the Queen, and the Queen happened to say to him; *I like thee the better, Whitehead, because thou livest unmarried.* He answered again; *In troth, Madam, I like you the worse for the same cause.*

† 271. There was a nobleman that was lean of visage, but immediately after his marriage he grew pretty plump and fat. One said to him, *Your lordship doth contrary to other married men; for they at the first wax lean, and you wax fat.* Sir Walter Ralegh stood by and said; *Why, there is no beast, that if you take him from the common and put him into the several, but he will wax fat.*

† 272. Diogenes seeing one that was a bastard casting

[1] If the physician and the disease join, that is a strong disease; and the physician mistaking the cure, then, &c. R.

[2] not drenched, or. R.

[3] This sentence is omitted in R.

stones among the people, bade him *Take heed he hit not his father.*

273. (97.) Dr. Laud[1] said; *That some hypocrites and seeming mortified men, that held down their heads, were like little images that they place in the very bowing of the vaults of churches, that look as if they held up the church, but are but puppets.*[2]

274. (104.) It was said among some of the grave prelates of the council of Trent, in which the school-divines bore the sway; *That the school-men were like the astronomers; who to save the phenomena, framed to their conceit eccentrics and epicycles, and a wonderful engine of orbs, though no such things were: so they, to save the practice of the church, had devised a number of strange positions.*

†275. It was also said by many, concerning the canons of that council; *That we are beholding to Aristotle for many articles of our faith.*

276. (35.) The Lo. Henry Howard, being Lord Privy Seal, was asked by the King openly at the table, (where commonly he entertained the King,) upon the sudden[3]; *My lord, have you not a desire to see Rome?* My lord Privy Seal answered, *Yes, indeed, Sir.* The King said, *And why?* My lord answered, *Because, and it please your Majesty, it was once the seat of the greatest monarchy, and the seminary of the bravest men in the world, amongst the heathen: and then again*[4], *because after it was the see of so many holy Bishops in the primitive church, most of them martyrs.* The King would not give it over, but said; *And for nothing else?* My lord answered; *Yes, and it please your Majesty, for two things especially.*[5] *The one, to see him, who they say hath such a power to forgive other men's sins, to confess his own sins upon his knees before a chaplain or priest; and the other is, to hear Antichrist say his creed.*

277. (235.) There was a nobleman said of a great counsellor; *That he would have made the worst farrier in the world, for he never shod horse but he cloyed him: so he never commended any man to the King for service, or upon occasion of suit, or otherwise,*

[1] The Lord Archbishop Laud. R.

[2] were like the little images in the vaults or roofs of churches, which look and bow down as if they held up the church, when as they bear no weight at all. R.

[3] The same Earl of Northampton, then Lord Privy Seal, was asked by King James openly at the table, where commonly he entertained the King with discourse; the King asked him upon the sudden. R.

[4] secondly. R.

[5] for two things more. R.

but that he would come in in the end with a But, and drive in a nail to his disadvantage.

†278. There was a lady of the west country, that gave great entertainment at her house to most of the gallant gentlemen thereabout; and amongst others, Sir Walter Ralegh was one. This lady, though otherwise a stately dame, was a notable good housewife; and in the morning betimes she called to one of her maids that looked to the swine, and asked; *Is the piggy served?* Sir Walter Ralegh's chamber was fast by the lady's, so as he heard her. A little before dinner, the lady came down in great state into the great chamber, which was full of gentlemen: And as soon as Sir Walter Ralegh set eye upon her; *Madam,* (saith he) *is the piggy serv'd?* The lady answered, *You know best whether you have had your breakfast.*

279. (237.) There was a gentleman fell very sick, and a friend of his said to him; *Surely, you are in danger; I pray send for a physician.* But the sick man answered; *It is no matter, for if I die, I will die at leisure.*

280. (193.) There was an Epicurean vaunted, that divers of other sects of philosophers did after turn Epicureans, but there was never any Epicurean that turned to any other sect. Whereupon a philosopher that was of another sect, said; *The reason was plain, for that cocks may be made capons, but capons could never be made cocks.*

APOPHTHEGMS

CONTAINED IN THE SECOND EDITION OF THE RESUSCITATIO (1661), AND NOT IN THE ORIGINAL COLLECTION.[1]

3. His Majesty James the First, King of Great Britain, having made unto his Parliament an excellent and large declaration, concluded thus: *I have now given you a clear mirror of my mind; use it therefore like a mirror; and take heed how you let it fall, or how you soil it with your breath.*

5. His Majesty said to his Parliament at another time, finding there were some causeless jealousies sown amongst them; *That the King and his people, (whereof the Parliament is the representative body,) were as husband and wife; and therefore that of all other things jealousy was between them most pernicious.*

6. His Majesty, when he thought his counsel mought note in him some variety in businesses, though indeed he remained constant, would say; *That the sun many times shineth watery; but it is not the sun which causeth it, but some cloud rising betwixt us and the sun: and when that is scattered, the sun is as it was, and comes to his former brightness.*

7. His Majesty, in his answer to the book of the Cardinal of Evereux, (who had in a grave argument of divinity sprinkled many witty ornaments of poesy and humanity) saith; *That these flowers were like blue and yellow and red flowers in the corn, which make a pleasant shew to those that look on, but they hurt the corn.*

8. Sir Edward Cook, being vehement against the two Provincial Councils, of Wales and the North, said to the King; *There was nothing there but a kind of confusion and hotch-potch of justice: one while they were a Star-Chamber; another while a Kings-bench; another, a Common-place; another, a Commission of Oyer and Terminer.* His Majesty answered; *Why, Sir Edward Cook, they be like houses in progress, where I have not, nor can*

[1] See Preface, pp. 114. 118.

have, such distinct rooms of state, as I have here at Whitehall, or at Hampton-court.

9. The Commissioners of the Treasure moved the King, for the relief of his estate, to disafforest some forests of his; explaining themselves of such forests as lay out of the way, not near any of the King's houses, nor in the course of his progress; whereof he should never have use nor pleasure. *Why,* (saith the King) *do you think that Salomon had use and pleasure of all his three hundred concubines?*

10. His Majesty, when the committees of both Houses of Parliament presented unto him the instrument of Union of England and Scotland, was merry with them; and amongst other pleasant speeches, shewed unto them the laird of Lawreston, a Scotchman, who was the tallest and greatest man that was to be seen; and said; *Well, now we are all one, yet none of you will say, but here is one Scotchman greater than any Englishman;* which was an ambiguous speech; but it was thought he meant it of himself.

11. His Majesty would say to the lords of his counsel, when they sat upon any great matter, and came from counsel in to him; *Well, you have sit, but what have you hatched?*

13. Queen Elizabeth was importuned much by my Lord of Essex, to supply divers great offices that had been long void; the Queen answered nothing, to the matter; but rose up on the sudden, and said; *I am sure my office will not be long void.* And yet at that time there was much speech of troubles and divisions about the crown, to be after her decease; but they all vanished; and King James came in, in a profound peace.

17. King Henry the fourth of France was so punctual of his word, after it was once passed, that they called him *The King of the Faith.*[1]

18. The said King Henry the fourth was moved by his Parliament to a war against the Protestants: he answered; *Yes, I mean it; I will make every one of you captains; you shall have companies assigned you.* The Parliament observing whereunto his speech tended, gave over, and deserted the motion.[2]

21. A great officer at court, when my Lord of Essex was first in trouble; and that he and those that dealt for him would talk much of my Lord's friends and of his enemies; answered to

[1] Lamb MS. p. 18. (see above, p. 119.) [2] Id. ibid. (without the last sentence)

one of them; *I will tell you, I know but one friend and one enemy my Lord hath; and that one friend is the Queen, and that one enemy is himself.*

27. The Lord Keeper, Sir Nicholas Bacon, was asked his opinion, by my lord of Leicester, concerning two persons whom the Queen seemed to think well of: *By my troth, my Lord,* (said he) *the one is a grave counsellor; the other is a proper young man; and so he will be as long as he lives.*

28. My Lord of Leicester, favourite to queen Elizabeth, was making a large chase about Cornbury-Park; meaning to inclose it with posts and rails; and one day was casting up his charge, what it would come to. Mr. Goldingham, a free spoken man, stood by, and said to my Lord, *Methinks your Lordship goeth not the cheapest way to work. Why, Goldingham?* said my Lord. *Marry, my Lord,* said Goldingham, *count you but upon the posts, for the country will find you railing.*

36. There were fishermen drawing the river at Chelsea: Mr. Bacon came thither by chance in the afternoon, and offered to buy their draught: they were willing. He asked them what they would take? They asked thirty shillings. Mr. Bacon offered them ten. They refused it. *Why then,* saith Mr. Bacon, *I will be only a looker on.* They drew, and catched nothing. Saith Mr. Bacon; *Are not you mad fellows now, that might have had an angel in your purse, to have made merry withal, and to have warmed you thoroughly, and now you must go home with nothing. Ay but* (said the fishermen) *we had hope then to make a better gain of it.* Saith Mr. Bacon; *Well, my masters, then I'll tell you, hope is a good breakfast, but it is a bad supper.*[1]

36. A lady walking with Mr. Bacon in Gray's Inn walks, asked him, *Whose that piece of ground lying next under the walls was?* He answered, *Theirs.* Then she asked him, if those fields beyond the walks were theirs too? He answered, *Yes, Madam, those are ours, as you are ours, to look on, and no more.*[2]

37. His Lordship, when he was newly made Lord Keeper, was in Gray's Inn walks with Sir Walter Raleigh. One came and told him, that the Earl of Exeter was above. He continued upon occasion still walking a good while. At last when he came up, my Lord of Exeter met him, and said; *My Lord, I*

[1] See Lamb. MS. p. 1. where the story is set down almost exactly in the same words.
[2] Id. p. 1. (told more compactly). The number 36 is repeated in R.

have made a great venture, to come up so high stairs, being a gouty man. His Lordship answered; *Pardon me, my lord, I have made the greatest venture of all*[1]; *for I have ventured upon your patience.*

38. When Sir Francis Bacon was made the King's Attorney, Sir Edward Cooke was put up from being Lord Chief Justice of the Common Pleas, to be Lord Chief Justice of the King's Bench; which is a place of greater honour, but of less profit; and withal was made Privy Counsellor. After a few days, the Lord Cooke meeting with the King's Attorney, said unto him; *Mr. Attorney, this is all your doing: It is you that have made this great stir.* Mr. Attorney answered; *Ah my Lord! your Lordship all this while hath grown in breadth; you must needs now grow in height, or else you would be a monster.*[2]

39. One day Queen Elizabeth told Mr. Bacon, that my Lord of Essex, after great protestation of penitence and affection, fell in the end but upon the suit of renewing his farm of sweet wines. He answered; *I read that in nature there be two kinds of motions or appetites in sympathy; the one as of iron to the adamant, for perfection; the other as of the vine to the stake, for sustentation; that her Majesty was the one, and his suit the other.*[3]

40. Mr. Bacon, after he had been vehement in Parliament against depopulation and inclosures; and that soon after the Queen told him that she had referred the hearing of Mr. Mill's cause to certain counsellors and judges; and asked him how he liked of it? answered, *Oh, madam! my mind is known; I am against all inclosures, and especially against inclosed justice.*[4]

41. When Sir Nicholas Bacon the Lord Keeper lived, every room in Gorhambury was served with a pipe of water from the ponds, distant about a mile off. In the lifetime of Mr. Anthony Bacon, the water ceased. After whose death, his Lordship coming to the inheritance, could not recover the water without infinite charge. When he was Lord Chancellor, he built Verulam House, close by the pond-yard, for a place of privacy when he was called upon to dispatch any urgent business. And being asked, why he built that house there; his Lordship answered, *That since he could not carry the water to his house, he would carry his house to the water.*[5]

[1] the greater venture. Lamb. MS.
[2] Lamb. MS.
[3] Id. p. 6.
[4] Id. p. 8.
[5] Id. p. 9. (told more shortly).

42. When my Lord President of the Council came first to be Lord Treasurer, he complained to my Lord Chancellor of the troublesomeness of the place; for that the Exchequer was so empty. The Lord Chancellor answered; *My Lord, be of good cheer, for now you shall see the bottom of your business at the first.*[1]

43. When his Lordship was newly advanced to the Great Seal, Gondomar came to visit him. My Lord said; *That he was to thank God and the King for that honour; but yet, so he might be rid of the burthen, he could very willingly forbear the honour; and that he formerly had a desire, and the same continued with him still, to lead a private life.* Gondomar answered; *That he would tell him a tale; of an old rat, that would needs leave the world; and acquainted the young rats that he would retire into his hole, and spend his days solitarily; and would enjoy no more comfort: and commanded them upon his high displeasure*[2]*, not to offer to come in unto him. They forbore two or three days; at last, one that was more hardy than the rest, incited some of his fellows to go in with him, and he would venture to see how his father did; for he might be dead. They went in, and found the old rat sitting in the midst of a rich Parmesan cheese.* So he applied the fable after his witty manner.[3]

44. Rabelais tells a tale of one that was very fortunate in compounding differences. His son undertook the same course[4], but could never compound any. Whereupon he came to his father, and asked him, *what art he had to reconcile differences?*[5] He answered, *he had no other but this: to watch when the two parties were much wearied, and their hearts were too great to seek reconcilement at one another's hands; then to be a means betwixt them, and upon no other terms.* After which the son went home, and prospered in the same undertakings.[6]

62. There was an agent here for the Dutch, called Caroon; and when he used to move the Queen for further succours and more men, my lord Henry Howard would say; *That he agreed well with the name of Charon, ferryman of hell; for he came still for more men, to increase* regnum umbrarum.

[1] Lamb. MS. p. 10.
[2] upon his blessing. Lamb. MS. p. 4.
[3] so if he left the world he would retire to some rich place. Lamb. MS.
[4] So Lamb. MS. p. 63. R. has "said course."
[5] what trick he had to make friends. Lamb. MS.
[6] he would even be the means betwixt them. After which time the son prospered in the trade. Lamb. MS.

63. They were wont to call referring to the Masters in Chancery, *committing*. My Lord Keeper Egerton, when he was Master of the Rolls, was wont to ask; *What the cause had done, that it should be committed?*

64. They feigned a tale, principally against Doctors' reports in the Chancery; That Sir Nicholas Bacon, when he came to heaven gate, was opposed, touching an unjust decree which had been made in the Chancery. Sir Nicholas desired to see the order, whereupon the decree was drawn up; and finding it to begin *Veneris, etc. Why*, (saith he) *I was then sitting in the Star-chamber; this concerns the Master of the Rolls; let him answer it.* Soon after came the Master of the Rolls, Cordal, who died indeed a small time after Sir Nicholas Bacon; and he was likewise stayed upon it; and looking into the order, he found, that upon the reading of a certificate of Dr. Gibson, it was ordered, that his report should be decreed. And so he put it upon Dr. Gibson, and there it stuck.

65. Sir Nicholas Bacon, when a certain nimble-witted counsellor at the bar, who was forward to speak, did interrupt him often, said unto him; *There is a great difference betwixt you and me: a pain to me to speak, and a pain to you to hold your peace.*

66. The same Sir Nicholas Bacon, upon bills exhibited to discover where lands lay,—upon proof that they had a certain quantity of land, but could not set it forth, was wont to say; *And if you cannot find your land in the country, how will you have me find it in the Chancery?*

67. Mr. Houland, in conference with a young student, arguing a case, happened to say; *I would ask you but this question.* The student presently interrupted him, to give him an answer. Whereunto Mr. Houland gravely said; *Nay, though I ask you a question, yet I did not mean you should answer me; I mean to answer myself.*

91. Archbishop Grindall was wont to say; *That the physicians here in England were not good at the cure of particular diseases; but had only the power of the Church, to bind and loose.*

123. Titus Quinctius was in the counsel of the Achaians, what time they deliberated, whether in the war then to follow between the Romans and King Antiochus, they should confederate themselves with the Romans, or with King Antiochus? In that counsel the Ætolians, who incited the Achaians against the Romans, to disable their forces, gave great words, as if the

late victory the Romans had obtained against Philip king of Macedon, had been chiefly by the strength and forces of the Ætolians themselves: And on the other side the embassador of Antiochus did extol the forces of his master; sounding what an innumerable company he brought in his army; and gave the nations strange names; As Elymæans, Caducians, and others. After both their harangues, Titus Quinctius, when he rose up, said; *It was an easy matter to perceive what it was that had joined Antiochus and the Ætolians together; that it appeared to be by reciprocal lying of each, touching the other's forces.*

124. Plato was amorous of a young gentleman, whose name was Stella, that studied astronomy, and went oft in the clear nights to look upon the stars. Whereupon Plato *wished himself heaven, that he mought look upon Stella with a thousand eyes.*

153. Themistocles, after he was banished, and had wrought himself into great favour afterwards, so that he was honoured and sumptuously served; seeing his present glory, said unto one of his friends, *If I had not been undone, I had been undone.*

214. A certain countryman being at an Assizes, and seeing the prisoners holding up their hands at the bar, related to some of his acquaintance; *That the judges were good fortune-tellers; for if they did but look upon a man's hand, they could tell whether he should live or die.*

216. A seaman coming before the judges of the Admiralty for admittance into an office of a ship bound for the Indies, was by one of the judges much slighted, as an insufficient person for that office he sought to obtain; the judge telling him; *That he believed he could not say the points of his compass.* The seaman answered; *That he could say them, under favour, better than he could say his Pater-noster.* The judge replied; *That he would wager twenty shillings with him upon that.* The seaman taking him up, it came to trial: and the seaman began, and said all the points of his compass very exactly: the judge likewise said his *Pater-noster:* and when he had finished it, he required the wager according to agreement; because the seaman was to say his compass better than he his *Pater-noster*, which he had not performed. *Nay, I pray, Sir, hold,* (quoth the seaman,) *the wager is not finished: for I have but half done*: and so he immediately said his compass backward very exactly; which the judge failing of in his *Pater-noster*, the seaman carried away the prize.

239. A certain friend of Sir Thomas Moore's, taking great pains about a book, which he intended to publish, (being well conceited of his own wit, which no man else thought worthy of commendation,) brought it to Sir Thomas Moore to peruse it, and pass his judgment upon it; which he did: and finding nothing therein worthy the press, he said to him with a grave countenance; *That if it were in verse, it would be more worthy.* Upon which words, he went immediately and turned it into verse, and then brought it to Sir Thomas again; who looking thereon, said soberly; *Yes, marry, now it is somewhat, for now it is rhyme; whereas before it was neither rhyme nor reason.*

247. A gentleman that was punctual of his word, and loved the same in others, when he heard that two persons had agreed upon a meeting about serious affairs, at a certain time and place; and that the one party failed in the performance, or neglected his hour; would usually say of him, *He is a young man then.*[1]

249. His lordship when he had finished this collection of Apophthegms, concluded thus: *Come, now all is well: they say, he is not a wise man that will lose his friend for his wit; but he is less a wise man that will lose his friend for another man's wit.*[2]

[1] "He broke his promise," said Sir Ralph, "he is a young man then, under twenty years old; and no exception to be taken."—Lamb. MS.

[2] "When Sir John Finch and myself had gone over my lord's apophthegms, he said, 'Now it is well: you know it is a common saying that he is an unwise man who will lose his friend for his jest: but he is a more unwise man who will lose his friend for another man's jest.'"—Lamb. MS. p. 10.

APOPHTHEGMS

PUBLISHED BY DR. TENISON IN THE BACONIANA.[1]

1. PLUTARCH said well, It is otherwise in a commonwealth of men than of bees. The hive of a city or kingdom is in best condition when there is least of noise or buz in it.

2. The same Plutarch said of men of weak abilities set in great place, That they were like little statues set on great bases, made to appear the less by their advancement.

3. He said again, Good fame is like fire. When you have kindled it, you may easily preserve it; but if once you extinguish it, you will not easily kindle it again; at least, not make it burn as bright as it did.

4. The answer of Apollonius to Vespasian is full of excellent instruction: Vespasian asked him, *What was Nero's overthrow?* He answered, *Nero could touch and tune the harp well; but in government sometimes he used to wind the pins too high, sometimes to let them down too low.* And certain it is, that nothing destroyeth authority so much as the unequal and untimely interchange of power pressed too far, and relaxed too much.

5. Queen Elizabeth seeing Sir Edward —— in her garden, looked out at her window, and asked him in Italian, *What does a man think of when he thinks of nothing?* Sir Edward (who had not had the effect of some of the Queen's grants so soon as he had hoped and desired) paused a little, and then made answer, *Madam, he thinks of a woman's promise.* The Queen shrunk in her head; but was heard to say, *Well, Sir Edward, I must not confute you.* Anger makes dull men witty, but it keeps them poor.[2]

[1] See Preface, pp. 115. 119.

[2] Queen Elizabeth saw Sir Edward Dier in her garden, she looking out at window, and asked him in Italian, *What does a man think of when he thinks of nothing?* Sir Edward Dier, after a little pause, said in Italian, *Madam, of a woman's promise.* The Queen shrunk in her head and shut the window.—Lamb. MS. p. 21.

6. When any great officer, ecclesiastical or civil, was to be made, the Queen would inquire after the piety, integrity, learning of the man. And when she was satisfied in these qualifications, she would consider of his personage. And upon such an occasion she pleased once to say to me, *Bacon, how can the magistrate maintain his authority when the man is despised?*[1]

7. In eighty-eight, when the Queen went from Temple-bar along Fleet-street, the lawyers were ranked on one side, and the companies of the city on the other; said Master Bacon to a lawyer that stood next him, *Do but observe the courtiers; if they bow first to the citizens, they are in debt; if first to us, they are in law.*[2]

8. King James was wont to be very earnest with the country gentlemen to go from London to their country houses. And sometimes he would say thus to them; *Gentlemen, at London you are like ships in a sea, which shew like nothing; but in your country villages you are like ships in a river, which look like great things.*

9. Soon after the death of a great officer, who was judged no advancer of the King's matters, the King said to his solicitor Bacon, who was his kinsman; *Now tell me truly, what say you of your cousin that is gone?* Mr. Bacon answered, *Sir, since your Majesty doth charge me, I'll e'en deal plainly with you, and give you such a character of him, as if I were to write his story. I do think he was no fit counsellor to make your affairs better; but yet he was fit to have kept them from growing worse.* The King said, *On my so'l, man, in the first thou speakest like a true man, and in the latter like a kinsman.*

10. King James, as he was a prince of great judgment, so he was a prince of a marvellous pleasant humour; and there now come into my mind two instances of it.

As he was going through Lusen by Greenwich, he asked what town it was? They said Lusen. He asked a good while after, What town is this we are now in? They said, still 'twas Lusen. *On my so'l,* said the King, *I will be King of Lusen.*[3]

[1] My Lo. St. Albans hath often told me that Queen Elizabeth when she was to make a bishop or a great officer, besides his learning, piety, and integrity, she would have some respect to the person of the man.—Lamb. MS. p. 34.

[2] Lamb. MS. p. 35.

[3] King James was going through Lusen by Greenwich. He asked what town it was. They said Lusen. He asked about half an hour after. 'Twas Lusen still. Said the king, *I will be king of Lusen.*—Lamb. MS. p. 84.

11. In some other of his progresses, he asked how far it was to a town whose name I have forgotten. They said, *Six miles.* Half an hour after, he asked again. One said, *Six miles and a half.* The King alighted out of his coach, and crept under the shoulder of his led horse. And when some asked his Majesty what he meant; *I must stalk,* (said he) *for yonder town is shy and flies me.*[1]

12. Count Gondomar sent a compliment to my Lord St. Albans, wishing him a good Easter. My Lord thanked the messenger, and said, He could not at present requite the Count better than in returning him the like; *That he wished his Lordship a good Passover.*[2]

13. My Lord Chancellor Elsmere, when he had read a petition which he disliked, would say, *What! you would have my hand to this now?* And the party answering, Yes; he would say further; *Well, so you shall. Nay, you shall have both my hands to it.* And so would, with both his hands, tear it in pieces.[3]

14. I knew a wise man, that had it for a by-word, when he saw men hasten to a conclusion, *Stay a little, that we may make an end the sooner.*

15. Sir Francis Bacon was wont to say of an angry man who suppressed his passion, That *he thought worse than he spake;* and of an angry man that would chide, That *he spoke worse than he thought.*[4]

16. He was wont also to say, *That power in an ill man was like the power of a black witch; he could do hurt, but no good with it.* And he would add, *That the magicians could turn water into blood, but could not turn the blood again to water.*

17. When Mr. Attorney Cook, in the Exchequer, gave high words to Sir Francis Bacon, and stood much upon his higher

[1] He asked how far to a town. They said six miles. Half an hour after he asked again. One said six miles and an half. He lighted from his coach and crept under his horse's shoulder. Some asked him what his M. meant. He said he must stalk, for yonder town fled from him.— Lamb. MS. p. 84.

[2] Lamb. MS. p. 72. Gondomar, I presume, was about to return to Spain. I cannot believe that his message was meant for an insult, as has been supposed; though I can well believe that the popular hatred of Spain and everything Spanish was apt enough to put that construction upon it. But there are no traces of any unkindness between Gondomar and Bacon. These compliments may have been exchanged at Easter-tide in 1622. Easter-day fell on the 21st of April that year, and a new Spanish ambassador arrived a week after. — See Court and Times of James I., ii. 309.

[3] The party would say an it like your Lp. He would answer, *you shall have both my hands to it,* and so would rend it.— Lamb. MS. p. 60.

[4] If one suppresseth his anger he thinks worse than he says; but when he chides, then he says worse than he thinks.— Lamb. MS. p. 24.

place; Sir Francis said to him, *Mr. Attorney, the less you speak of your own greatness, the more I shall think of it: and the more, the less.*[1]

18. Sir Francis Bacon coming into the Earl of Arundel's garden, where there were a great number of ancient statues of naked men and women, made a stand, and as astonished, cried out, *The resurrection.*[2]

19. Sir Francis Bacon (who was always for moderate counsels) when one was speaking of such a reformation of the Church of England as would in effect make it no Church; said thus to him, *Sir, the subject we talk of is the eye of England; and if there be a speck or two in the eye, we endeavour to take them off; but he were a strange oculist who would pull out the eye.*

20. The same Sir Francis Bacon was wont to say, *That those who left useful studies for useless scholastic speculations, were like the Olympic gamesters, who abstained from necessary labours, that they might be fit for such as were not so.*

21. He likewise often used this comparison; *The Empirical philosophers are like to pismires; they only lay up and use their store. The Rationalists are like to spiders; they spin all out of their own bowels. But give me a philosopher, who like the bee, hath a middle faculty, gathering from abroad, but digesting that which is gathered by his own virtue.*

22. The Lord St. Alban, who was not over hasty to raise theories, but proceeded slowly by experiments, was wont to say to some philosophers who would not go his pace, *Gentlemen, Nature is a labyrinth, in which the very haste you move with, will make you lose your way.*

23. The same Lord, when he spoke of the Dutchmen, used to say, *That we could not abandon them for our safety, nor keep them for our profit.* And sometimes he would express the same sense on this manner; *We hold the Belgic lion by the ears.*[3]

24. Sir Francis Bacon said upon occasion (meaning it of his old retinew) *That he was all of one piece: his head could not rise but his tail must rise too.*[4]

[1] When Mr. Attorney Cooke gave in the Exchequer high words to Mr. Bacon, he replied, *Mr. Attorney*, &c.—Lamb. MS. p. 7.

[2] My Lo. St. Albans coming into the Earl of Arundel's garden where there were many statues of naked men and women, made a stand and said, "*The resurrection.*"—Lamb. MS. p. 65.

[3] My Lo. St. Albans was wont to say that it was our greatest unhappiness, that we could not abandon those for our safety who were the greatest enemies to our profit. —Lamb. MS. p. 85.

[4] So Lamb. MS. p. 5. In the Baconiana it is given thus: "The same Lord when

25. The Lord Bacon was wont to commend the advice of the plain old man at Buxton, that sold besoms. A proud lazy young fellow came to him for a besom upon trust; to whom the old man said, *Friend, hast thou no money? borrow of thy back, and borrow of thy belly; they'll ne'er ask thee again, I shall be dunning thee every day.*[1]

26. Solon said well to Crœsus, (when in ostentation he shewed him his gold) *Sir, if any other come that has better iron than you, he will be master of all this gold.*

27. Jack Weeks said of a great man (just then dead) who pretended to some religion, but was none of the best livers, *Well, I hope he is in heaven. Every man thinks as he wishes; but if he be in heaven, 'twere pity it were known.*[2]

a gentleman seemed not much to approve of his liberality to his retinue, said to him, *Sir, I am all of a piece; if the head be lifted up, the inferior parts of the body must too.*" It will be observed that Rawley's notes of these apophthegms are in almost every case better than Dr. Tenison's version, by whom they have evidently been dressed for company. In this case I thought the improved version too bad, and made the note and the text change places. That such an alteration could have been sanctioned by Bacon is utterly incredible.

[1] The old man at Buxton that answered him that would have been trusted for brooms: Hast thou no money? borrow of thy back and borrow of thy belly: they'll ne'er ask thee again: I shall be ever asking thee.—Lamb. MS. 5.

[2] Jack Weeks said of the Bishop of London, Montagu; I hope he is in heaven. Every man thinks as he wisheth; but if he be there 'twere pity it were known.—Lamb. MS. p. 55.

SOME ADDITIONAL APOPHTHEGMS

SELECTED FROM A COMMON-PLACE BOOK IN THE HAND-WRITING OF DR. RAWLEY, PRESERVED AT LAMBETH.

MSS. No. 1034.[1]

[THE manuscript from which the following apophthegms are selected bears no date or title. But the contents show that it was a common-place book in which Dr. Rawley entered memoranda from time to time; and a few dates occur incidentally; the earliest of which is 8 September 1626, (five months after Bacon's death,) and the latest is 25 May 1644. The memoranda are of various kinds, many of them relating to Bacon and his works, many to Dr. Rawley's private affairs. Among them are a number of anecdotes, some very good, but not stated to be derived from Bacon or otherwise connected with him, and therefore not noticed here. It is true that several of the apophthegms printed by Tenison in the *Baconiana* are set down in this manuscript without any hint that Bacon had anything to do with them. It is possible therefore that they too may have been of Dr. Rawley's own selection; who seems to have had a taste for good stories, and seldom spoiled them. But judging by the style, I think it more probable that most of them were copied from Bacon's own notes.]

1. Apophthegms. My Lo.[2]: I was the justest judge that was in England these 50 yeares: But it was the justest censure in Parliament that was these 200 yeares.

2. The same Mr. Bacon[3] went towards Finchley to take the

[1] See above, p. 119.

[2] That is, "my Lord St. Alban said of himself." This is the first entry in the book, and is set down in a kind of cipher; the consonants being written in Greek characters, and the six vowels represented by the six numerals; 1 = a; 2 = e; 3 = i; 4 = o; 5 = u; 6 = y.

[3] In the MS. this follows the story of Bacon and the fishermen at Chelsea. Rawley's Collection, No. 36.

air. There had been growing not long before a pretty shady wood. It was then missing: Said Mr. Bacon, Stay, I've not lost my thoughts in a wood, but methinks I miss a wood here. Saith a country fellow, It is newly cut down. Said Mr. Bacon, Sure he was but a churl that ought it, to cut down a wood of great pleasure and to reap but small profit into his purse. Said the fellow, It was the Bishop of London.[1] Then answered Mr. Bacon, Oh, was it he: he's a learned man: it seems this was an obscure place before, and the Bishop hath expounded the text.

3. A flattering courtier undertook to make a comparison betwixt my Lord St. Alban and Treasurer Cranfield. Said he, My Lord St. Alban had a pretty turning wit, and could speak well: but he wanted that profound judgment and solidity of a statesman that my Lord of Middlesex hath. Said a courtier that stood by: Sir I wonder you will disparage your judgment so much as to offer to make any parallel betwixt these two. I'll tell you what: when these two men shall be recorded in our chronicles to after ages, men will wonder how my Lord St. Alban could fall; and they will wonder how my Lord of Middlesex could rise.

4. There was one would say of one that he thought every man fit for every place.[2]

5. My Lord Chancellor told the King, that if he bestowed 7000*l*. upon Paul's steeple, he could not lay out his money where it should be more seen.

6. When they sat in commission about reedifying Paul's steeple, some of the rich aldermen being there, it was motioned to build a new spire upon it. A rich alderman answered; My Lords, you speak of too much cost: Paul's is old: I think a good cap would do well. My Lord Chancellor, who was for the spire, answered: Mr. Alderman, you that are citizens are for the cap; but we that are courtiers are for the hat and feather.

7. [There was] an old woman whom the minister asked, How many commandments there were. She answered, it was above her learning: she was never taught it. Saith the minister, there are ten. Good Lord (said the old woman) a goodly

[1] Bishop Aylmer, probably; who died in 1594. See Nichols's Progr. Eliz. iii. p. 369.

[2] This sounds to me very like a note of Bacon's; though his name is not mentioned.

company. He told them her particularly, and then asked her if she had kept them all? Kept them? (said she:) alas master, I am a poor woman: I have much ado to keep myself.

8. Sir Harry Mountague came to my Lord Chancellor before he went to the court to Newmarket, and told him; My Lord, I come to do my service to your Lordship: I am even going to Newmarket and I hope to bring the staff[1] with me when I come back. My Lord (said my Lord Chancellor) take heed what you do: I can tell you wood is dearest at Newmarket of any place in England.

9. When the said Lord lost his Treasurer's place, he came to my Lord St. Alban, and told him how they had used him; that though they had taken away the Lord Treasurer's place, yet they had made him Lord President of the Counsel: Why, saith my Lord St. Alban, the King hath made me an example and you a president.[2]

10. When Sergeant Heale who is known to be good in giving in evidence, but otherwise unlearned in the law, was made the Queen's sergeant, Mr. Bacon said; The Queen should have a sergeant *de facto et non de jure.*

11. At the King's Bench bar, Sergeant Heale, before he was the Queen's sergeant, contended with Mr. Bacon to be first heard; and said, Why I am your ancient: Mr. Bacon gently answered, Not in this place; for I staid here long, and you are come but right now.

12. There was a tall gentleman and a low gentleman were saying they would go to the Shrive's to dinner; Go, saith the one, and I will be your shadow. Nay, saith the other, I will be your shadow. Mr. Bacon standing by said, I'll tell you what you shall do: Go to dinner and supper both; and at dinner when [the shadows are] shorter than the bodies, you shall be the shadow; and at supper you shall be the other's shadow.[3]

13. He thought Moses was the greatest sinner that was, for he never knew any break both tables at once but he.[4]

[1] The Lord Treasurer's staff.

[2] So *precedent* was usually spelt in those days.

[3] So the MS. It should be "the other shall be your shadow."

But the thing is better told in a common-place book of Bacon's own (Harl. MSS. 7017.). "The two that went to a feast both at dinner and supper, neither known, the one a tall, the other a short man; and said they would be one another's shadows. It was replied, it fell out fit: for at noon the short man might be the long man's shadow and at night the contrary."

[4] This is written in cipher.

14. He said he had feeding swans and breeding swans; but for malice, he thanked God, he neither fed it nor bred it.[1]

15. At the Parliament, when King James spied Mr. Gorge, one of my Lord Chancellor's men, who was somewhat fantastical, and stood by there with one rose white and another black; the King called my Lord unto him, and said easily in his ear; My Lord Chancellor, why does your man yonder wear one rose white and another black? My Lord answered; In truth, Sir, I know not, unless it be that his mistress loves a colt with one white foot.

16. Sir Walter Coape and Sir Francis Bacon were competitors for the Mastership of the Wards. Sir Francis Bacon certainly expecting the place had put most of his men into new cloaks. Afterward when Sir Walter Coape carried the place, one said merrily that Sir Walter was Master of the Wards, and Sir Francis Bacon of the Liveries.

17. My Lord St. Alban said, that wise nature did never put her precious jewels into a garret four stories high: and therefore that exceeding tall men had ever very empty heads.[2]

18. My Lord St. Alban invited Sir Ed. Skory to go with him to dinner to a Lord Mayor's feast. My Lord sate still and picked a little upon one dish only. After they returned to York-house, my Lord wished him to stay and sup with him: and told him he should be witness of the large supper he would make: telling him withal: Faith, if I should sup for a wager, I would dine with a Lord Mayor.

19. Sir Robert Hitcham said, He cared not though men laughed at him: he would laugh at them again. My Lord St. Alban answered, If he did so he would be the merriest man in England.

20. My Lord St. Alban would never say of a Bishop *the Lord that spake last*, but *the Prelate that spake last*. King James chid him for it, and said he would have him know that the Bishops were not only *Pares*, as the other Lords were, but *Prælati paribus*.[3]

21. He was a wise man[4] that gave the reason why a man doth not confess his faults. It is, *Quia etiam nunc in illis est.*

[1] This saying is alluded to by Rawley in his Life of Bacon.

[2] I have seen this quoted somewhere as Bacon's answer to King James when pressed for his opinion as to the capacity of a French ambassador who was very tall.

[3] This I think must be misreported. It must have been Bacon who defended himself on this ground for preferring "Prelate" to "Peer:" for so Prelate would imply Peer, whereas Peer would not imply Prelate.

[4] Seneca, Ep. 53.

22. Will you tell any man's mind before you have conferred with him? So doth Aristotle in raising his axioms upon Nature's mind.

23. Old Lord Keeper Sir Nicholas Bacon had his barber rubbing and combing his head. Because it was very hot[1], the window was open to let in a fresh wind. The Lord Keeper fell asleep, and awaked all distempered and in great sweat. Said he to his barber, Why did you let me sleep? Why, my Lord, saith he, I durst not wake your Lordship. Why then, saith my Lord, you have killed me with kindness. So removed into his bed chamber and within a few days died.

24. Four things cause so many rheums in these days, as an old country fellow told my Lord St. Alban. Those were, drinking of beer instead of ale; using glass windows instead of lattice windows; wearing of silk stockings; missing of smoky chimneys.

25. King James and Gondomar were discoursing in Latin. The King spoke somewhat of Tully's Latin. Gondomar spoke very plain stuff. Gondomar laughed. The King asked him, Why he laughed? He answered, Because your Majesty speaks Latin like a scholar, and I speak Latin like a King.

26. Gondomar said, Compliment was too hot for summer, and too cold in winter. He meant it against the French.

27. King Henry the fourth of France having an oration offered him, and the orator beginning "Great Alexander," said the King, Come let's begone.

28. The beggar, that instructed his son, when he saw he would not be handsome, said, You a beggar! I'll make you a ploughman.

29. Marquis Fiatt's first compliment to my Lord St. Albans was, That he reverenced him as he did the angels, whom he read of in books, but never saw.[2]

[1] "The 4 of February [21 Eliz. i. e. 1578–9] . . . . fell such abundance of snow, &c. . . . It snowed till the eight day and freezed till the tenth. Then followed a thaw, with continual rain a long time after. . . . . The 20 of February deceased Sir Nicholas Bacon."— *Stowe's Chronicle.*

[2] Bacon being ill and confined to his bed, so that though admitted to his room he could not see him. Compare Rawley's Life of Bacon, Vol. I. p. 16. Tenison (*Baconiana*, p. 101.) makes Fiatt say, "Your Lordship hath been to me *hitherto* like the angels, of which I have often heard and read, but never saw them *before*:" (the words "hitherto" and "before" being his own interpolation, and entirely spoiling the story;) and proceeds, "To which piece of courtship he returned such answer as became a man in those circumstances, 'Sir, the charity of others does liken me to an angel, but my own infirmities tell me I am a man;'" of which reply there is no hint in Rawley, either in the common-place book or in the life: an addition, I suspect, by a later hand.

30. My Lord Chancellor Ellesmere's saying of a man newly married; God send him joy, and some sorrow too, as we say in Cheshire. The same my Lord St. Alban said of the Master of the Rolls.

31. My Lord St. Alban said, when Dr. Williams, Dean of Westminster, was made Lord Keeper; I had thought I should have known my successor.

32. My Lord St. Alban having a dog which he loved sick, put him to a woman to keep. The dog died. My Lord met her next day and said, How doth my dog? She answered in a whining tone, and putting her handkerchief to her eye, The dog is well, I hope.

33. The physician that came to my Lord after his recovery, before he was perfectly well. The first time, he told him his pulse was broken-paced; the next time, it tripped; the third day, it jarred a little. My Lord said, he had nothing but good words for his money.

34. Mr. Anthony Bacon chid his man (Prentise) for calling him no sooner. He said, It was very early day. Nay, said Mr. Bacon, the rooks have been up these two hours. He replied, The rooks were but new up: it was some sick rook that could not sleep.

35. [The following is not given in any of these collections, but comes from a letter of Mr. John Chamberlain to Sir Dudley Carleton, 11. Oct. 1617. See *Court and Times of James I.*, ii. p. 38.]

The Queen lately asked the Lord Keeper [Sir F. Bacon], What occasion the Secretary [Sir R. Winwood] had given him to oppose himself so violently against him: who answered prettily, "Madam, I can say no more, but he is proud, and I am proud."

NOTE.

There remain sixteen apophthegms which appear to have been introduced into the collection without any authority, and have no right to be there. But as they are to be found in all editions of Bacon's collected works, and readers may wish to judge for themselves, I add them here; with references to the book from which they were taken.[1]

[1] See above, pp. 114, 115, 119.

SPURIOUS APOPHTHEGMS,

INSERTED BY THE PUBLISHER OF THE THIRD EDITION OF THE RESUSCITATIO; 1671.

1. Sir Nicholas Bacon being appointed a judge for the northern circuit, and having brought his trials that came before him to such a pass, as the passing of sentence on malefactors, he was by one of the malefactors mightily importuned for to save his life; which, when nothing that he had said did avail, he at length desired his mercy on account of kindred. "Prithee," said my lord judge, "how came that in?" "Why, if it please you, my lord, your name is Bacon, and mine is Hog, and in all ages Hog and Bacon have been so near kindred, that they are not to be separated." "Ay, but," replied judge Bacon, "you and I cannot be kindred, except you be hanged; for Hog is not Bacon until it be well hanged."[1]

2. Two scholars and a countryman travelling upon the road, one night lodged all in one inn, and supped together, where the scholars thought to have put a trick upon the countryman, which was thus: the scholars appointed for supper two pigeons, and a fat capon, which being ready was brought up, and they having sat down, the one scholar took up one pigeon, the other scholar took the other pigeon, thinking thereby that the countryman should have sat still, until that they were ready for the carving of the capon; which he perceiving, took the capon and laid it on his trencher, and thus said, "Daintily contrived, every one a bird."[2]

3. A man and his wife in bed together, she towards morning pretended herself to be ill at ease, desiring to lie on her husband's side; so the good man, to please her, came over her, making some short stay in his passage over; where she had not long lain, but desired to lie in her old place again: quoth he, "How can it be effected?" She answered, "Come over me again." "I had rather," said he, "go a mile and a half about."[3]

4. A thief being arraigned at the bar for stealing of a mare, in his pleading urged many things in his own behalf, and at last nothing availing, he told the bench, the mare rather stole him, than he the mare; which in brief he thus related: That passing over several grounds about his lawful occasions, he was pursued close by a fierce mastiff dog, and so was forced to save himself by leaping over a hedge, which being of an agile body he effected; and in leaping, a mare standing on the other side of the hedge, leaped upon her back, who running furiously away with him, he could not by any means stop her, until he came to the next town, in which town the owner of the mare lived, and there was he taken, and here arraigned.[4]

5. A notorious rogue being brought to the bar, and knowing his case to be desperate, instead of pleading, he took to himself the liberty of jesting, and thus said, "I charge you in the king's name, to seize and take away that man (meaning the judge) in the red gown, for I go in danger of my life because of him."[5]

6. A rough-hewn seaman, being brought before a wise just-ass for some misdemeanor, was by him sent away to prison, and being somewhat refractory after he heard his doom, insomuch as he would not stir a foot from the place where he stood, saying, "it were better to stand where he was than go to a worse place:" the justice thereupon, to shew the strength of his learning, took him by the shoulder, and said, "Thou shalt go *nogus vogus*," instead of *nolens volens*.[6]

7. A debauched seaman being brought before a justice of the peace upon the account of swearing, was by the justice commanded to deposit his fine in that behalf provided, which was two shillings; he thereupon plucking out of his pocket a half crown, asked the justice what was the rate he was to pay for cursing; the justice told him six-pence: quoth he, "Then a pox take you all for a company of knaves and fools, and there's half a crown for you, I will never stand changing of money."[7]

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[1] Witty Apophthegms, 10. [2] Id. 11. [3] Id. 30.
[4] Id. 31. [5] Id. 38. [6] Id. 43. [7] Id. 60.

8. A witty rogue coming into a lace-shop, said he had occasion for some lace; choice whereof being shewed him, he at last pitched upon one pattern, and asked them, how much they would have for so much as would reach from ear to ear, for so much he had occasion for. They told him, for so much: so some few words passing between them, he at last agreed, and told down his money for it, and began to measure on his own head, thus saying: "One ear is here, and the other is nailed to the pillory in Bristol. and I fear you have not so much of this lace by you at present as will perfect my bargain: therefore this piece of lace shall suffice at present in part of payment, and provide the rest with all expedition."[1]

9. A woman being suspected by her husband for dishonesty, and being by him at last pressed very hard about it, made him quick answer with many protestations, "that she knew no more of what he said than the man in the moon." Now the captain of the ship called the Moon, was the very man she so much loved.[2]

10. An apprentice of London being brought before the Chamberlain by his master for the sin of incontinency, even with his own mistress, the Chamberlain thereupon gave him many christian exhortations; and at last he mentioned and pressed the chastity of Joseph, when his mistress tempted him with the like crime of incontinency. "Ay, Sir," said the apprentice; "but if Joseph's mistress had been as handsome as mine is, he could not have forborne."[3]

11. A company of scholars going together to catch conies, carried one scholar with them, which had not much more wit than he was born with; and to him they gave in charge, that if he saw any, he should be silent, for fear of scaring them. But he no sooner espied a company of rabbits before the rest, but he cried aloud, *Ecce multi cuniculi*, which in English signifies, "Behold many conies;" which he had no sooner said, but the conies ran to their burrows: and he being checked by them for it, answered, "Who the devil would have thought that the rabbits understood Latin?"[4]

12. A man being very jealous of his wife. insomuch that which way soever she went, he would be prying at her heels; and she being so grieved thereat, in plain terms told him, "that if he did not for the future leave off his proceedings in that nature, she would graft such a pair of horns upon his head, that should hinder him from coming out of any door in the house."[5]

13. A citizen of London passing the streets very hastily, came at last where some stop was made by carts; and some gentlemen talking together, who knew him; where being in some passion that he could not suddenly pass, one of them in this wise spoke unto him: "That others had passed by, and there was room enough, only they could not tell whether their horns were so wide as his."[6]

14. A tinker passing Cheapside with his usual tone, "Have you any work for a tinker?" an apprentice standing at a door opposite to a pillory there set up, called the tinker, with an intent to put a jest upon him, and told him, "that he should do very well if he would stop those two holes in the pillory;" to which the tinker answered, "that if he would but put in his head and ears a while in that pillory, he would bestow both brass and nails upon him to hold him in, and give him his labour into the bargain."[7]

15. A young maid having married an old man, was observed on the day of marriage to be somewhat moody, as if she had eaten a dish of chums, which one of her bridemen observing, bid her be cheery; and told her moreover, "that an old horse would hold out as long, and as well as a young, in travel." To which she answered, stroking down her belly with her hand, "But not in this road, Sir."[8]

16. A nobleman of this nation, famously known for his mad tricks, on a time having taken physic, which he perceiving that it began well to work, called up his man to go for a surgeon presently, and to bring his instruments with him. The surgeon comes in all speed; to whom my Lord related, that he found himself much addicted to women, and therefore it was his will that the cause of it might be taken away, and therefore commanded him forthwith to prepare his instruments ready for to geld him; so the surgeon forthwith prepares accordingly; and my Lord told him that he would not see it done, and that therefore he should do his work the back way; so both parties being contented, my L. makes ready, and when he perceives the surgeon very near him. he lets fly full in his face: which made the surgeon step back; but coming presently on again, "Hold, hold (saith my Lord) I will better consider of it: for I see the retentive faculty is very weak at the approach of such keen instruments."[9]

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[1] Witty Apophthegms, 74. [2] Id. 88. [3] Id. 108. [4] Id. 134.
[5] Id. 149. [6] Id. 153. [7] Id. 160. [8] Id. 166. [9] Id. 176.

PROMUS

OF

FORMULARIES AND ELEGANCIES.

PREFACE.

ALL the editions of Bacon's works contain a small collection of Latin sentences selected from the *Mimi* of Publius Syrus, under the title of *Ornamenta Rationalia;* followed by a larger collection of English sentences selected from Bacon's own writings. These are printed as two separate pieces, with titles which seem to imply that the selection was made by Bacon himself. But this is wrong. The history of them is shortly this. Dr. Tenison found in three several lists of Bacon's unpublished papers the title *Ornamenta Rationalia.* He remembered also to have seen in the possession of Dr. Rawley's son a collection made by Bacon under that title. But no part of it was to be found among the manuscripts transmitted to him, and he retained only a general remembrance of its quality, namely that "it consisted of divers short sayings, aptly and smartly expressed, and containing in them much of good sense in a little room;" and that "it was gathered partly out of his own store and partly from the ancients."[1] Considering himself to blame however for not having preserved it, "he held himself obliged, in some sort, and as he was able, to supply the defect;" and accordingly *made* a collection on the same plan, and printed it in the *Baconiana* with the following title:

"*Ornamenta Rationalia.* A supply (by the Publisher) of certain weighty and elegant *Sentences,* some made, others collected, *by the Lord Bacon;* and by him put under the above said Title; and at present not to be found."

The "supply" consists of, 1st, "a collection of sentences out of the *Mimi of Publius;* englished by the publisher;" 2nd, "a collection of sentences out of some of the writings of the Lord Bacon."

Whatever be the value of these collections, they have

[1] Baconiana, pp. 89. 94.

clearly no right to appear among the works of Bacon,—least of all under a title which ascribes them to Bacon himself,—inasmuch as the selection was avowedly and entirely the work of Dr. Tenison. But there is a MS. in the British Museum written in Bacon's own hand, and entitled *Promus of Formularies and Elegancies*, which (though made in his early life for his own use and not intended for preservation in that shape) contains many things which might have formed part of such a collection as Tenison describes; and the place of the lost *Ornamenta Rationalia* will perhaps be most properly supplied by an account of it.

A date at the top of the first page shows that it was begun on the 5th of December 1594,— the commencement of the Christmas vacation. It consists of single sentences, set down one after the other without any marks between or any notes of reference or explanation. This collection (which fills more than forty 4to pages) is of the most miscellaneous character, and seems by various marks in the MS. to have been afterwards digested into other collections which are lost.

The first few pages are filled chiefly, though not exclusively, with forms of expression applicable to such matters as a man might have occasion to touch in conversation,—neatly turned sentences describing personal characters or qualities,—forms of compliment, application, excuse, repartee, &c. These are apparently of his own invention, and may have been suggested by his own experience and occasions. But interspersed among them are apophthegms, proverbs, verses out of the Bible, and lines out of the Latin poets; all set down without any order or apparent connexion of subject; as if he had been trying to remember as many notable phrases as he could out of his various reading and observation, and setting them down just as they happened to present themselves.

As we advance, the collection becomes less miscellaneous; as if his memory had been ranging within a smaller circumference. In one place, for instance, we find a cluster of quotations from the Bible, following one another with a regularity which may be best explained by supposing that he had just been reading the Psalms, Proverbs, and Ecclesiastes, and then the Gospels and Epistles or (perhaps some commentary upon them), regularly through. The quotations are in Latin, and most of them agree exactly with the Vulgate, but not all; the differences howeve-

are not more than might perhaps have been expected, if he quoted from memory.

Passing this Scripture series, we come again into a collection of very miscellaneous character. Proverbs, French, Spanish, Italian, and English,—sentences out of Erasmus's Adagia,—verses from the Epistles, Gospels, Psalms, Proverbs of Solomon,—lines from Seneca, Horace, Virgil, Ovid,—succeed each other according to some law which, in the absence of all notes or other indications to mark the connexion between the several entries, the particular application of each, or the change from one subject to another, there is no hope of discovering; though in some places several occur together, which may be perceived by those who remember the struggling fortune and uncertain prospects of the writer in those years, together with the great design which he was meditating, to be connected by a common sentiment.

Here for instance is a cluster of passages taken indiscriminately from several poets, but all pointing to the same subject; which may be described generally as notes of encouragement to those who undertake enterprises that seem too great for their powers:

Est quâdam prodire tenus, si non datur ultra.[1]

Quem si non tenuit, magnis tamen excidit ausis.[2]

Conamur tenues grandia.[3]

Tentantem majora fere præsentibus æquum.[4]

Da facilem cursum, atque audacibus annue cœptis.[5]

Neptunus ventis implevit vela secundis.[6]

Crescent illæ, crescetis amores.[7]

Et quæ nunc ratio est impetus ante fuit.[8]

Aspice venturo lætentur ut omnia sæclo.[9]

Nor is it less easy, when we consider Bacon's position with regard to the reigning philosophy taught at the universities, to divine the connexion between the eight entries which follow:

In academiis discunt credere.

Vos adoratis quod nescitis.

[1] Hor. Epist. I. i. 32. [2] Ov. Met. ii. 328. [3] Hor. Od. I. vi. 9.
[4] Hor. Epist. I. xvii. 24. [5] Virg. Georg. I. 40. [6] Virg. Æn. vii. 23.
[7] Virg. Ec. x. 50. [8] Ov. Rem. Amor. 10. [9] Virg. Ec. iv. 52.

So give authors their due, as you give time his due, which is to discover truth.

Vos Græci semper pueri.

Non canimus surdis: respondent omnia sylvæ.

Populus vult decipi.

Scientiam loquimur inter perfectos.

Et justificata est sapientia a filiis suis.

Presently after we find the following cluster, which seem to bear upon the same subject:

Vitæ me redde priori.[1]

I had rather know than be known.[2]

Orpheus in sylvis, inter delphinas Arion.[3]

Inopem me copia fecit.[4]

An instrument in tuning.

A youth set will never be higher.

The nine following entries, which also stand together, need no antiquarian interpreter to make their meaning intelligible:

Væ vobis jurisperiti.

Nec me verbosas leges ediscere, nec me
Ingrato voces prostituisse foro.[5]

Fixit leges pretio atque refixit.

Nec ferrea jura
Insanumque forum et populi tabularia vidit.[6]

Miscueruntque novercæ non innoxia verba.[7]

Jurisconsulti domus, oraculum civitatis:
now as ambiguous as oracles.

[1] Hor. Epist. I. 7. 96.

[2] "Is enim ego sum qui malim scire quam nosci, discere quam docere."— *Ghetaldus's Archimedes Promotus*; quoted in Mr. Ellis's preface to *Historia Densi et Rari*.

[3] Ec. viii. 56. [4] Ov. Met. iii. 466. [5] Ov. Amor. I. xv. 5.

[6] Virg. Georg. ii. 502.

[7] This is a good instance of a mode of quotation not uncommon in Bacon, where an alteration is intentionally introduced for the sake of keeping so much as is to the purpose, and leaving out what is not so. Virgil's words (Georg. ii. 128.) are:

Pocula si quando sævæ infecere novercæ,
Miscueruntque herbas et *non innoxia verba.*

Applied to the lawyers, the word *herbas* would have had no meaning. *Novercæ* is substituted merely to complete the line.

Hic clamosi rabiosa fori
Jurgia vendens improbus, iras
Et verba locat.[1]

Presently we come to a series of English proverbs, all set down together, — remembrances probably or extracts out of some collection which he had been reading; and immediately after these, to a number of Latin proverbs, all taken apparently from some collection of the *Adagia* of Erasmus, in which the proverbs were arranged under heads, and the heads arranged alphabetically. For they are set down throughout in the order in which they would present themselves in such a volume, with no more exceptions than might naturally in such a case occur by accident.

Having gone through this volume (for the last extract is within a few pages of the end) he returns to modern proverbs; of which there follow a great number, at first chiefly Italian, then entirely Spanish, and lastly English again.

After this he returns again to his Erasmus, commencing as before near the beginning and proceeding regularly to the end, with only two or three deviations from the alphabetical order. The difference is, that in the former collection he selected nothing but proverbs and sentences, whereas in this he selects phrases only. The series is interrupted once or twice by a note or query of his own, relating to something which had occurred to him perhaps during his walk; as for instance that "wild thyme on the ground hath a scent like a cypress chest." "Where harts cast their horns;" "Few dead birds found;" "Salt to water, whence it came;" and the like.

Next we have another collection of proverbs like the former, one or two French, several Italian, more Spanish, most English. After which he returns for the third time to Erasmus, proceeding as before, but now again selecting sentences.

Having as before come to the end of the volume, he now it seems takes up the Æneid and reads it through; for there follow sixteen or seventeen lines, or fragments of lines, all taken from the Æneid and all set down in the order in which they come in the poem; the last being the 833rd line of the 12th book. Then come several lines from Ovid; then a few from Virgil's Eclogues and Georgics; then a good many from the Satires, Epistles, and

[1] Seneca, Herc. Fur.

Art Poetic of Horace; then another selection from the Æneid; and lastly a good many from Ovid's Heroides, and a few from the 1st and 2nd books of his Amores; and so the Promus concludes.

I have been thus particular in describing it, because it is chiefly interesting as an illustration of Bacon's manner of working. There is not much in it of his own. The collection is from books which were then in every scholar's hands, and the selected passages, standing as they do without any comment to show what he found in them or how he meant to apply them, have no peculiar value. That they were set down not as he read, but from memory afterwards, I infer from the fact that many of the quotations are slightly inaccurate. And because so many out of the same volume come together, and in order, I conclude that he was in the habit of sitting down from time to time, reviewing in memory the book he had last read, and jotting down those passages which for some reason or other he wished to fix in his mind. This would in all cases be a good exercise for the memory, and in some cases (as in the long list of classical *phrases* out of Erasmus, hardly any of which he ever made use of in his own writings) it may have been practised for that alone. But there is something in his selection of sentences and verses out of the poets which seems to require another explanation; for it is difficult sometimes to understand why those particular lines should have been taken and so many others apparently of equal note passed by. My conjecture is, that most of these selected expressions were connected in his mind, by some association more or less fanciful, with certain trains of thought; and stood as mottoes (so to speak) to little chapters of meditation. My meaning will be easily understood by any one who will observe carefully the manner in which similar passages are introduced by the way, or specially commented upon, in his works. If for instance we had met in some collection like this with Homer's line,

χαίρετε κήρυκες, Διὸς ἄγγελοι ἠδὲ καὶ ἀνδρῶν,

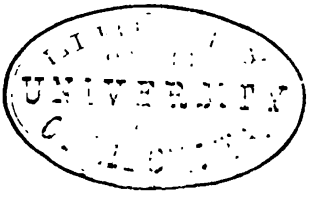
we might well have wondered what he saw in it to make him select it for especial distinction. But observe how it is introduced in the opening of the 4th book of the *De Augmentis Scientiarum*, and the value of it is explained. So again if we met in a similar collection with the twenty-four proverbs which

are selected for exposition in the 8th book of the *De Augmentis*, standing by themselves without comment, we might wonder at the selection; but when we read the explanations which are there annexed, we see how much meaning in his mind they carried with them. Some further light may perhaps be thrown on this point by an observation, or the hint of an observation, which I find in a sheet of memoranda in his hand-writing (Harl. MSS. 7017. fo. 107.) which seems to have been preserved in the same bundle with the "Promus." It is a thought jotted down in evident haste, and in circumstances apparently very inconvenient for calligraphy,—with a bad pen or bad ink, or in the dark, or perhaps in a carriage,—and stands thus, *literatim*.

"Mot. of the mynd explicate in woords implicate in thowghts. I judg. best implicate in thowg. or pticul. or mark. bycause of swiftnes collocat. and differe. and to make woords sequac."

By which I understand him to mean, that he found the slow and imperfect process of expounding ideas in words to impede too much the free motions of the mind; and that he judged it a better practice to keep the pure mental conception involved in the thought, or represented by some particular image or simple mark; because by that means the mental process of comparison and distinction could be carried on more swiftly, and a habit acquired of "making words sequacious;" that is of teaching words to follow ideas, instead of making ideas wait upon words. I am not aware that he ever recorded this as his final judgment upon the point, but it may serve to explain his own practice at this time of embodying his thoughts in brief sentences, picturesque images, or memorable expressions; such as might serve to represent and recall the entire idea which remained *in puris naturalibus* in his mind.

From what I have said, it will be readily understood that this Promus, which is of considerable length, is not worth printing *in extenso*. But my account of it may be thought too incomplete without some extracts by way of specimen. For this purpose I shall select such entries as have most substantial value, independent of that Baconian comment which no editor can now supply; and I shall arrange them as well as I can under separate heads according to their character.



EXTRACTS

FROM THE

PROMUS OF FORMULARIES AND ELEGANCIES.

I.

It is a fact worth knowing,—for it may serve as a caution and encouragement both, and it is one of those which the reverence of posterity is too apt to overlook or keep out of sight,—that the various accomplishments for which Bacon was distinguished among the men of his time, were not given to him ready-made. It may be gathered from this manuscript that the secret of his proficiency was simply that, in the smallest matters no less than in the greatest, he took a great deal of pains. Everybody prepares himself beforehand for great occasions. Bacon seems to have thought it no loss of time to prepare for small ones too, and to have those topics concerning which he was likely to have to express himself in conversation ready at hand and reduced into "forms" convenient for use. Even if no occasion should occur for using them, the practice would still serve for an exercise in the art of expression.

Here for instance are some forms for describing personal characters or qualities:

1. No wise speech, though easy and voluble.
2. Notwithstanding his dialogues (of one that giveth life to his speech by way of question).
3. He can tell a tale well (of those courtly gifts of speech which are better in describing than in considering).
4. A good comediante (of one that hath good grace in his speech).
5. Cunning in the humours of persons, but not in the conditions of actions.
6. He had rather have his will than his wish.

7. A brain cut with fascets.
8. More ingenious than natural.
9. He keeps his ground: — of one that speaketh certainly and pertinently.
10. He lighteth well; — of one that concludeth his speech well.
11. Of speeches digressive: This goeth not to the end of the matter: — from the lawyers.[1]
12. *Per otium:* — to anything impertinent.
13. Speech that hangeth not together nor is concludent: Raw silk; sand.
14. Speech of good and various weight but not nearly applied: — A great vessel that cannot come near land.
15. Of one that rippeth things up deeply: He shooteth too high a compass to shoot near.
16. Ingenuous honesty and yet with opposition and strength.

Here again is a set of phrases adapted to occasions of compliment, of excuse, of application, of acknowledgment, of introduction, of conclusion, &c., belonging to the same class with the *formulæ minores orationis*, of which he explains the nature and use in the 4th book of the *De Augmentis* under the head of Rhetoric:

1. The matter though it be new, (if that be new which hath been practised in like case, though not in this particular).
2. I leave the reasons to the party's relation and the consideration of them to your wisdom.
3. Wishing you all, &c., and myself occasion to do you service.
4. I shall be glad to understand your news, but none rather than some overture wherein I may do you service.
5. Ceremonies and green rushes are for strangers.
6. Small matters need solicitation; great are remembered of themselves.
7. The matter goeth so slowly forward that I have almost forgot it myself, so as I marvel not if my friends forget.

[1] The last three forms are not from the Promus, but from a separate sheet of similar character, fo. 107. The next four are from another, fo. 109.

8. I shall be content my course intended for service leave me in liberty.

9. It is in vain to forbear to renew that grief by speech, which the want of so great a comfort must needs renew.

10. As I did not seek to win your thanks, so your courteous acceptation deserveth mine.

11. I desire no secret news, but the truth of common news.

12. The difference is not between you and me, but between your profit and my trust.

13. Why hath not God sent you my mind or me your means?

14. I think it my double good hap, both for the obtaining and for the mean.

15. I wish one as fit as I am unfit.

A separate sheet in the same bundle is filled with forms of morning and evening salutation.

The following may be all classed under the head of *repartees*, and were probably suggested by his experience in the courts of law:

1. Now you say somewhat. — Even when you will; now you begin to conceive, I begin to say.

2. Repeat your reason.—Bis ac ter pulchra.

3. You go from the matter.—But it was to follow you.

4. Come to the point.—Why I shall not find you there.

5. Let me make an end of my tale.—That which I will say will make an end of it.

6. You take more than is granted. — You grant less than is proved.

7. It is so, I will warrant you.—You may warrant me, but I think I shall not vouch you.

8. Answer me shortly.—Yea, that you may comment upon it.

9. The cases will come together.—It will be to fight then.

There are more of these; but these will serve for specimens.

II.

In wise sentences and maxims of all kinds the collection, as might be expected, is rich. But very many of them are now hacknied, and many others are seen to greater advantage in different parts of Bacon's works, where they are accompanied with his comments or shewn in their application. The general character of them will be sufficiently understood from the following samples, which are taken almost at random:

1. Suavissima vita indies meliorem fieri:
2. Stay a little, that we may make an end the sooner.
3. L' astrologia è vera, ma l' astrologico non vi truova.
4. If the bone be not true set, it will never be well till it be broken.
5. All is not in years, somewhat is in hours well spent.
6. Detractor portat diabolum in linguâ.
7. Velle suum cuique est, nec voto vivitur uno.
8. Black will take no other hue.
9. Qui in parvis non distinguit in magnis labitur.
10. Everything is subtle till it be conceived.
11. That which is forced is not forcible.
12. Quod longe jactum est leviter ferit.
13. Nec nihil neque omnia sunt quæ dicuntur.
14. Super mirari cœperunt philosophari.
15. Prudens celat scientiam, stultus proclamat stultitiam.
16. Non recipit stultus verba prudentiæ nisi ea dixeris quæ sunt in corde ejus.[1]
17. Melior claudus in via quam cursor extra viam.
18. The glory of God is to conceal a thing, and the glory of a man is to find out a thing.
19. Facile est ut quis Augustinum vincat, viderit utrum veritate an clamore.
20. Hinc errores multiplices, quod de partibus vitæ singuli deliberant, de summa nemo.

[1] A sentence frequently quoted by Bacon. It is the Vulgate version of Proverbs xviii. 2., which is rendered differently in the English translation, viz.: "A fool hath no delight in understanding *but that his heart may discover itself*;" the meaning of which I do not understand.

21. Optimi consiliarii mortui.
22. Odere reges dicta quæ dici jubent.
23. I contemn few men, but most things.
24. Variam dant otia mentem.
25. Non possumus aliquid contra veritatem sed pro veritate.
26. Qui bene nugatur ad mensam sæpe vocatur.
27. A man's customs are the moulds where his fortune is cast.
28. He that resolves in haste repents at leisure.
29. You would be over the stile before you come at it.
30. I never liked proceeding upon articles before books, nor betrothings before marriages.
31. Nothing is impossible to a willing heart.
32. Better be envied than pitied.
33. Better sit still than rise and fall.
34. Always let losers have their words.
35. He goes far that never turneth.
36. Suum cuique pulchrum.
37. Quæ supra nos nihil ad nos.
38. In magnis et voluisse sat est.
39. Et post malam segetem serendum est.
40. Bonæ leges ex malis moribus.
41. Nil tam bonum est quin male narrando possit depravarier.
42. Totum est majus sua parte (against factions and private profit).
43. Turpe proco ancillam sollicitare, est autem virtutis ancilla laus.

III.

Of the sentences taken from the Bible and from the *Adagia* of Erasmus, I need not give any specimens; for I can throw no light on the principle which guided Bacon in selecting them, and if I were to attempt to make another selection from his I should only be adding a few more sentences of the same kind as those just given; several of which do in fact come from Erasmus and some from the Bible.

IV.

The proverbs may all or nearly all be found in our common collections; and the best of them are of course in everybody's mouth. The following, which are among the least familiar to modern ears, may serve for a sample.

1. De nouveau tout est beau.
   De saison tout est bon.
2. A long winter maketh a full ear.
3. While the leg warmeth the boot harmeth.
4. Be the day never so long
   At last it ringeth to evensong.
5. Seldom cometh the better.
6. He that will sell lawn before he can fold it
   Shall repent him before he have sold it.
7. A beck is as good as a Dieu vous garde.
8. When bale is heckst boot is next.
9. He that never clomb never fell.
10. Itch and ease can no man please.
11. All this wind shakes no corn.
12. Timely crooks the tree
    That will a good camock be.
13. Better is the last smile than the first laughter.
14. The cat knows whose lips she licks.
15. As good never a whit as never the better.
16. The packs may be set right by the way.
17. It is the cat's nature and the wench's fault.
18. Good watch chooseth ill adventure.
19. Early rising hasteneth not the morning.
20. Let them that be a-cold blow at the coal.
21. I have seen as far come as nigh.
22. Tell your cards and tell me what you have won.

23. When thrift is in the field he is in the town.
24. That he wins in the hundred he loses in the shire.
25. To do more than the priest spake of on Sunday.
26. Use maketh mastery.
27. Love me little, love me long.
28. Time trieth troth.
29. Make not two sorrows of one.
30. There is no good accord
    Where every one would be a lord.
31. That the eye seeth not, the heart rueth not.
32. Ill putting a sword in a madman's hand.
33. Quien nesciamente pecca nesciamente va al Inferni.

V.

I cannot find anything in the lines selected from Virgil, Horace, or Ovid, that should make it worth while to print them here. Those from Virgil may have been used with excellent effect for rhetorical purposes, but it would depend upon the occasion and manner in which they were introduced. Most of those from Horace are so full of sense in the observation and felicity in the expression that they would be well worth printing as they stand, only that everybody knows them. And the same remark applies, though in a less degree, to those from Ovid: for Ovid was a fine observer and a great master of neat and pointed expression. His *Ars amandi* sparkles with observations and precepts which the best didactic writers on the worthiest subjects have scarcely surpassed. The following extracts, nicely picked out of that most unworthy poem, stand together in the Promus; and contain the seeds of half a treatise on the art of persuasion, whether in speech or writing:

Sed lateant vires, nec sis in fronte disertus.

Sit tibi credibilis sermo consuetaque lingua
. . . . præsens ut videare loqui.[1]

[1] The omission of the words "Blanda tamen," which complete the line in the original, indicates the principle of selection. From the precepts given by Ovid for the

Ille referre aliter sæpe solebat idem.

Nec vultu destrue verba tuo.

Nec sua vesanus scripta poeta legat.

Ars casum simulet.

Quid cum legitimâ fraudatur litera voce,
Blæsaque fit jusso lingua coacta sono?

And these will probably be thought enough by way of specimen.

VI.

There is one other class of memoranda in this Promus which I have not yet mentioned, and they are the more notable because they have been transferred with additions and a formal title to a separate sheet (fo. 126.), as if he had intended to proceed with the collection. This fragment I have thought worth printing *in extenso;* not only as a curious illustration of the attention which Bacon bestowed upon the details and smaller graces of his art, but also because it may possibly throw some light on the history of the English language. It is headed *Analogia Cæsaris* (a title by the way, of which, comparing it with the supposed character of Cæsar's lost book *de Analogia*, as explained in the *De Augmentis*, lib. vi. c. 1. I do not see the fitness) and docqueted by Bacon himself *Verba interjectiva; sive ad grā sparsā.* It is fairly written in Bacon's own hand, in three parallel columns. But this I think was only to save paper; for the articles which happen to lie over against each other do not appear to be connected in any way; and therefore I have not thought it necessary to preserve that form in the printing. In other respects I have copied it literatim. Those who are curious as to the periods when particular forms of expression came into use or wore out, may perhaps derive some useful hints from it. But to enter into any speculations of that kind here would be to go beyond my province as editor.

particular art of Love, or rather of Love-making, Bacon takes so much only as relates to *art* in general.

ANALOGIA CÆSARIS.

VERB. ET CLAUSULÆ AD EXERCITATIONEM ACCENTUS ET AD GRATIAM SPARSAM ET AD SUITATEM.

Say that; (for admitt that)

Peraventure can yow; Sp. (what can you).

So much there is. fr. (neverthelesse).

See then how. Sp. (much lesse).

Yf yow be at leasure | furnyshed &c. as phappes yow are (instead of are not).

For the rest (a transition concluding).

The rather bycause (contynuing another's speach).

To the end, saving that, whereas, yet, (contynuances, and so of all kynds.

In contemplation (in consideration).

Not prejudicing.

With this (cum hoc quod verificare vult).

Without that (absq. hoc quod

For this tyme (when a man extends his hope or imaginacon or beleefe to farre.

A mery world when such fellowes must correct × A mery world when the simplest may correct.

It is like S^{r} &c. (putting a man agayne into his tale interrupted.

Your reason.

I have been allwaies at his request.

His knowledg lieth about him.

Such thoughts I would exile into my dreames.

A good crosse poynt but the woorst cinq a pase.

He will never doe his tricks clean.

A proper young man and so will he be while he lives.

2. of these fowre take them where yow will.

I have knowne the tyme and it was not half an howre ago.

Pyonner in the myne of truth.

As please the painter.

A nosce teipsū (a chiding or disgrace.

Valew me not the lesse bycause I am yours.

Is it a small thing y^{t} &c. (cannot yow not be content, an hebraisme.

What els? Nothing lesse.

It is not the first untruth I have heard reported nor it is not the first truth I have heard denied.

I will proove × why goe and proove it.

Minerall wytts strong poyson yf they be not corrected.

O the '

O my L. S^{r}

Beleeve it.

Beleeve it not.

for a tyme.

Mought it please God that. fr. (I would to God.

Never may it please yow.

As good as the best.

I would not but yow had doone it × But shall I doe it againe.

The sonne of somew^{t}. $\widehat{Sp}$

To freme (to sigh (?) $\widehat{Sp}$.

To cherish or endear.

To undeceive. $\widehat{Sp}$. To disabuse[1]

deliver and unwrapped.

To discount (to cleere.

Brazed (impudent.

Brawned seared unpayned.

Vice light (Twylight.

banding (factions.

Remooving (remuant).

A third person (a broker.

A nose cut of; tucked up.

His disease hath certen traces.

[1] An interlineation, written under $\widehat{Sp}$.

To plaine him on (?).
Ameled (fayned, counterfett in the best kynd.
Having the upper grownd (awcthority.
His resorts (his conceyts.
It may be well last for it hath lasted well.
Those are great with yow that are great by yow.
The avenues.
A back-thought.
Baragan (perpetuo juvenis).
A Bonance (a caulme.
To drench, to potion (to infect.
Haggard in sauvages.
Infistuled (made hollow with malign dealing.
The ayre of his behavio^{r}; fashons.

VII.

There are two other papers in the same bundle which are worth printing, because they help to show the sort of use Bacon made of these rough collections. One of them (fo. 114.) is dated 27th January 1595 (that is 1595-6), about fourteen months after the commencement of the Promus, but appears to have been revised and corrected at a later period. It seems to be a rudiment or fragment of one of those collections by way of "provision or preparatory store for the furniture of speech and readiness of invention" which he recommends in the *Advancement of Learning*, and more at large in the *De Augmentis* (lib. vi. c. 3.) under the head of Rhetoric; and which, he says, "appeareth to be of two sorts; the one in resemblance to a shop of pieces unmade up, the other to a shop of things ready made up, both to be applied to that which is frequent and most in request: the former of these I will call *antitheta* and the latter *formulæ*.

"*Antitheta* are theses argued *pro et contra*, wherein men may be more large and laborious; but in such as are able to do it, to avoid prolixity of entry, I wish the seeds of the several arguments to be cast up into some brief and acute sentences, not to be cited, but to be as skeins or bottoms of thread, to be

unwinded at large when they come to be used; supplying authorities and examples by reference. . . . . .

"*Formulæ* are but decent and apt passages and conveyances of speech, which may serve indifferently for differing subjects; as of preface, conclusion, digression, transition, excusation, &c. For as in buildings there is great pleasure and use in the well-casting of the stair-cases, entries, doors, windows, and the like: so in speech, the conveyances and passages are of special ornament and effect."[1]

Of these *antitheta*, a considerable collection is given in the *De Augmentis* by way of example. The *Analogia Cæsaris* contains several examples of these *formulæ*. The paper before us seems to belong rather to the former class. The sentences appear to have been written in the first instance consecutively, without any note of the subjects to which they are to be referred. The titles have been added afterwards in the margin. I distinguish them here by Italics.

FORMULARIES, PROMUS. 27 Jan. 1595.

Ayainst conceyt of difficulty or impossibility.

Tentantes ad Trojam pervenere Graii.
Atque omnia pertentare.

Abstinence and negatives.

Qui in agone contendit a multis abstinet.
All the coñaundm^ts^. negative save two.

Curious, busy without judgm^t^, good direction.

Parerga; moventes sed nil promoventes, operosities, nil ad sum̄am.
Claudus in via.
To give the grownd in bowling.
Like tempring with phisike, a good diett much better.

Zeal, affectiō, alacrity.

Omnia possū in eo qui me confortat.
Possunt quia posse vident^r^.
Exposition of not overweening but overwilling.
Goddes presse; voluntaries.

[1] Vol. III. p. 412.

Detraction.

Chester's wytt to deprave, and otherwise not wyse.

Hast, impatience.

In actions as in wayes the neerest y^e^ fowlest.

On the back of the sheet is written "fragments of Elegancyes."

The other paper (fo. 108.) bears no date. It is a commencement of a collection of *antitheta*, the *pro* and *contra* being set down in opposite columns, under their proper heads. It is very fairly written in Bacon's own hand, and large blank spaces are left between the several heads, as if for further insertions; yet it seems to have been entirely rejected afterwards, for though some of the questions are handled in the collection of *antitheta* given in the *De Augmentis*, none of these sentences are introduced there, or not in the same relation.

Upon Impatience of Audience.

Verbera sed audi.
Auribus mederi difficillimum.
Noluit intelligere ut bene ageret.
The ey is the gate of the affection, but the ear of the understanding.
The fable of the Syrenes.
Placidasque viri deus obstruit aures.

Upon quæstiō to reward evill w^th^ evill.

Noli æmulari in malignantibus.
Crowne him with coles.
Nil malo quā illos similes esse sui et me mei.
Cum perverso perverteris.
Lex talionis.
Yow are not for this world.
Tanto buon che val niente.

Upon quæstiō whether a mā should speak or forbear speach.

Quia tacui inveteraverunt ossa mea. (Speach may now and then breed smart in the flesh; but keeping it in goeth to the bone.)
Credidi propter quod locutus sum.
Obmutui et nō aperui os meum quoniā tu fecisti.
It is goddes doing.
Posui custodiam ori meo cū consisteret peccator adversum me.

Obmutui et humiliatus sum.
Silui etiam a bonis et dolor meus renovatus est.

Ego autem tanquam surdus non audiebam et tanq^{m} mutus non aperiens os suum.

Benedictions and Maledictions.

Et folium ejus nō defluet.
Mella fluant illi, ferat et rubus asper amomū.

Abominacon.

Dii meliora piis.
Horresco referens.

VIII.

One or two other papers belonging to this bundle I may have occasion to quote hereafter, in connexion with the subjects to which they refer. But there is one which stands by itself, and though not belonging exactly to the class of "Formularies," is curious enough to be worth preserving, and may be allowed in default of a fitter place to come in here.

I suppose no man was less given to play than Bacon. But the following sheet of notes (written hastily and carelessly in his own Roman hand) shows that on some occasion or other he had thought a good deal about it. In the catalogue of particular histories, which were to combine into the great Natural and Experimental History that was to serve for the foundation of Philosophy, the 123rd title is *Historia Ludorum omnis generis.*[1] And it may be that he once thought of drawing up directions for the execution of it, or possibly even of doing a portion by way of specimen; as his manner was. Here at any rate is the plan of an elaborate treatise on the subject.

Play.[2]

The syn against the holy ghost—termed in zeal by one of the fathers.

Cause of oths, quarells, expence and unthriftines: ydlenes and indispositiō of the mynd to labors.

[1] Vol. I. p. 410.
[2] Harl. MSS. 7017. f. 110. The writing goes down to the very bottom of the first page.

Art of forgetting; cause of society, acquaintance, familiarity in frends; neere and ready attendance in servants; recreatiō and putting of melancholy.

Putting of malas curas et cupiditates.

Games of activity and passetyme; of act. of strength, quicknes; quick of ey, hand, legg, the whole mocō: strength of arme; legge; of activity, of sleight.

Of passetyme onely; of hazard; of play mixt.

Of hazard; meere hazard; cunnyng in making y^e^ game: Of playe; exercise of attentiō: of memory: of dissimulation: of discrecō.

Of many hands or of receyt: of few: of quick returne, tedious; of præsent judgm^t^, of uncerten yssue.

Severall playes or ideas of play.

Frank play, wary play; venturous, not venturous; quick, slowe.

Oversight: Dotage: Betts: Lookers on: Judgm^t^.

Groome porter: Christmas: Inventiō for hunger[1](?).

Oddes: stake: sett.

He that folowes his losses and giveth soone over at wynnings will never gayne by play.

Ludimus incauti studioque aperimur ab ipso.

He that playeth not the begynnyng of a game well at tick tack and the later end at yrish shall never wynne.

Frier Gilbert.

Y^e^ lott; earnest in old tyme sport now, as musike out of Church to chamb^r^.

[1] I doubt whether this is the right word; but it is more like it than any other I can think of. The writing comes up to the very edge of the paper here, and part of the word is perhaps lost: it may possibly have been "hangers on."

RELIGIOUS WRITINGS.

PREFACE

TO

A CONFESSION OF FAITH.

BACON'S religious creed might, if we were left without special information concerning it, be gathered with tolerable accuracy from his general works. For though the passages which relate especially to matters theological are few and short, his theory of the relation between the Creator and the Creatures, the Word and the Works, is incorporated with all his views, and forms an essential part of his theory of the world. Nor is it merely that the moral and sentimental element of religion is strong in him, — trust, love, reverence, submission; sense of the presence of an inspiring, governing, protecting, judging God, whose will is law, and in the pleasing and displeasing of whom right and wrong, good and evil, have (for man) their being, — together with recognition of the life of Christ on earth as the highest exposition and interpretation of that will; but the entire scheme of Christian theology, — creation, temptation, fall, mediation, election, reprobation, redemption, — is constantly in his thoughts; underlies everything; defines for him the limits of the province of human speculation; and as often as the course of enquiry touches at any point the boundary-line, never fails to present itself. Nor is it by any means a formal creed reserved for solemn occasions and forbidden to mix with week-day thoughts and businesses; but being accepted without any reserve or misgiving as the ultimate explanation of everything, there is hardly any occasion or any kind of argument into which it does not at one time or another incidentally introduce itself. Fortunately however it is not from such incidental allusions that we are left to gather his creed. We have it here set forth by himself distinctly and completely in all its parts: an

articulate Confession of Faith; not transcribed from the catechism, but digested and reproduced in a form of his own; in which the several parts of the scheme are exhibited in logical coherency, and presented in a light as satisfactory perhaps to the understanding as the case admits, — a case in which that which is to be comprehended is infinite, and that which is to comprehend, finite.[1]

This Confession was first printed in the *Remains* (1648) with a title stating that it was written by Bacon "about the time he was solicitor general;" afterwards in the *Resuscitatio* by Rawley, who merely says that he composed it many years before his death. But in the manuscript from which the text is here taken (Harleian MSS. 1893. fo. 1.), — a copy in the hand of one of Bacon's own servants, and the oldest I have met with, — it is headed "a Confession of Faith by *M^r* Bacon;"[2] from which we may certainly conclude that it was written before he was knighted; that is before the summer of 1603; how long before, I know of no data for determining.

To criticise the theology of it would be beyond my province. But if any one wishes to read a *summa theologiæ* digested into seven pages of the finest English of the days when its tones were finest, he may read it here.

[1] "Les idées Chrétiennes y sont traduites" (says M. Charles de Rémusat, than whom no man has studied Bacon with a more sincere desire to understand him,) "sous une forme aussi rationelle qu'il est possible de le faire sans les alterer. Rien n'est outré, rien n'est attenué. Le mystère y est rendu intelligible jusqu'au point où il cesserait d'être un mystère. . . . Ce n'est pas une adhésion verbale à un pur formulaire, mais la déduction d'une croyance réfléchie, et, suivant nous, un monument des plus propres à frapper les esprits les moins dociles à toute inspiration Chrétienne." —*Bacon: sa Vie, son Influence, et sa Philosophie*, p. 152.

[2] There are three other MSS. in the British Museum: one (Addit. 4263. fo. 111.) which seems to have belonged to Dr. Rawley, and is partly in his hand, headed *A Confession of the Faith, by Fr. Bacon*; and two others (Harl. 6828. fo. 1., and Addit. 211. fo. 82.), transcripts by hands comparatively modern, which are headed respectively *S^r Fran. Bacon, his Confession of his faith*: and, *A Confession of the faith, written by Francis Lord Viscount S^t Albans at* (sic) *or before he was Solicitor Generall.* The older MS. which I have followed has apparently been the original of all three. In almost every case where the *Resuscitatio* varies from it, — and certainly in every case which is at all material, — all the other MSS. agree with it.

CONFESSION OF FAITH.

A CONFESSION OF FAITH,[1]

BY

MR. BACON.

I BELIEVE that nothing is without beginning but God; no nature, no matter, no spirit, but one only and the same God. That God as he is eternally almighty, only wise, only good, in his nature, so he is eternally Father, Son, and Spirit, in persons.

I believe that God is so holy, pure, and jealous, as it is impossible for him to be pleased in any creature, though[2] the work of his own hands; So that neither Angel, Man, nor World, could stand, or can stand, one moment in his eyes, without beholding the same in the face of a Mediator; And therefore that before him with whom all things are present, the Lamb of God was slain before all worlds; without which eternal counsel of his, it was impossible for him to have descended to any work of creation; but he[3] should have enjoyed the blessed and individual society of three persons in Godhead only for ever.

But that out of his eternal and infinite goodness and love purposing to become a Creator, and to communicate with[4] his creatures, he ordained in his eternal counsel, that one person of the Godhead should in time[5] be united to one nature and to one particular of his creatures: that so in the person of the Mediator the true ladder might be fixed, whereby God might descend to his creatures, and his creatures might ascend to God: so that God, by the reconcilement of the Mediator,

[1] A Confession of the Faith, written by the Right Honourable Francis Bacon, Baron of Verulam, &c. R.

[2] So R. The old MS. has "through."

[3] So R. The MSS. omit "he."

[4] to. R.

[5] R. omits "in time."

turning his countenance towards his creatures, (though not in the same light[1] and degree,) made way unto the dispensation of his most holy and secret will; whereby some of his creatures might stand and keep their state, others might possibly fall and be restored, and others might fall, and not be restored in their state[2], but yet remain in being, though under wrath and corruption: all in the virtue of[3] the Mediator; which is the great mystery and perfite[4] centre of all God's ways with his creatures, and unto which all his other works and wonders do but serve and refer.

That he chose (according to his good pleasure) Man to be that creature, to whose nature the person of the eternal Son of God should be united; and amongst the generations of men, elected a small flock, in whom (by the participation of himself) he purposed to express the riches of his glory; all the ministration of angels, damnation of devils and reprobate[5], and universal administration of all creatures, and dispensation of all times, having no other end, but as the ways and ambages of God to be further glorified in his Saints, who are one with the Mediator[6], who is one with God.

That by the virtue of this his eternal counsel touching a Mediator[7], he descended at his own good pleasure[8], and according to the times and seasons to himself known, to become a Creator; and by his eternal Word created all things, and by his eternal Spirit doth comfort and preserve them.

That he made all things in their first estate good, and removed from himself the beginning of all evil and vanity into the liberty of the creature; but reserved in himself the beginning of all restitution to the liberty of his grace; using nevertheless and turning the falling and defection of the creature, (which to his prescience was eternally known) to make way to his eternal counsel touching a Mediator, and the work he purposed to accomplish in him.

That God created Spirits, whereof some kept their standing, and others fell. He created heaven and earth, and all their armies and generations, and gave unto them constant and ever-

[1] though not in equal light. R. The MS. 6828. has "though not in the same height;" which is perhaps right. In 4263. the word is illegible from damp.
[2] estate. R.
[3] with respect to. R.
[4] perfect. R.
[5] reprobates. R.
[6] their head the Mediator. R.
[7] R. omits the words "touching a Mediator."
[8] condescended of his own good pleasure. R.

lasting laws, which we call *Nature*, which is nothing but the laws of the creation; which laws nevertheless have had three changes or times, and are to have a fourth and last.[1] The first, when the matter of heaven and earth was created without forms: the second, the *interim* of every day's work[2]: the third, by the curse, which notwithstanding was no new creation, but a privation of part of the virtue of the first creation[3]: and the last, at the end of the world, the manner whereof is not yet revealed.[4] So as the laws of Nature, which now remain and govern inviolably till the end of the world, began to be in force when God first rested from his works and ceased to create; but received a revocation in part by the curse, since which time they change not.

That notwithstanding God hath rested and ceased from creating since the first Sabbath[5], yet nevertheless he doth accomplish and fulfil his divine will in all things great and small, singular and general, as fully and exactly by providence, as he could by miracle and new creation, though his working be not immediate and direct, but by compass; not violating Nature, which is his own law upon the creature.

That at the first the soul of Man was not produced by heaven or earth, but was breathed immediately from God; so that the ways and proceedings of God with spirits are not included in Nature, that is, in the laws of heaven and earth; but are reserved to the law of his secret will and grace: wherein God worketh still, and resteth not from the work of redemption, as he resteth from the work of creation: but continueth working till the end of the world; what time that work also shall be accomplished, and an eternal sabbath shall ensue. Likewise that whensoever God doth break[6] the law of Nature by miracles, (which are ever[7] new creations,) he never cometh to that point or pass, but in regard of the work of redemption, which is the greater, and whereto all God's signs and miracles do refer.

That God created Man in his own image, in a reasonable soul, in innocency, in free-will, and in sovereignty: That he gave him a law and commandment, which was in his power to

[1] or last. R. [2] the interim of the perfection of every day's work. R.
[3] This last clause ("but a privation," &c.) is omitted in R.
[4] fully revealed. R.
[5] "Sabaoth" in MS.: a mistake, but probably a mistake of Bacon's own. See Vol. III. p. 447. l. 24.
[6] transcend. R. [7] may ever seem as. R.

keep, but he kept it not: That man made a total defection from God, presuming to imagine that the commandments and prohibitions of God were not the rules of Good and Evil, but that Good and Evil had their own principles and beginnings; and lusted after the knowledge of those imagined beginnings, to the end to depend no more upon God's will revealed, but upon himself and his own light, as a God; than the which there could not be a sin more opposite to the whole law of God: That yet nevertheless this great sin was not originally moved by the malice of man, but was insinuated by the suggestion and instigation of the devil, who was the first defected creature, and fell of malice and not by temptation.

That upon the fall of Man, death and vanity entered by the justice of God, and the image of God in man was defaced, and heaven and earth which were made for man's use were subdued to corruption by his fall; but then that instantly and without intermission of time, after the word of God's law became through the fall of man frustrate as to obedience, there succeeded the greater word of the promise, that the righteousness of God might be wrought by faith.

That as well the law of God as the word of his promise endure the same for ever: but that they have been revealed in several manners, according to the dispensation of times. For the law was first imprinted in that remnant of light of nature, which was left after the fall, being sufficient to accuse: then it was more manifestly expressed in the written law; and was yet more opened by the prophets; and lastly expounded in the true perfection by the Son of God, the great prophet and perfect interpreter of the law.[1] That likewise the word of the promise was manifested and revealed, first by immediate revelation and inspiration; after by figures, which were of two natures: the one, the rites and ceremonies of the law; the other, the continual history of the old world, and Church of the Jews, which though it be literally true, yet is it pregnant of a perpetual allegory and shadow of the work of the Redemption to follow. The same promise or evangile was more clearly revealed and declared by the prophets, and then by the Son himself, and lastly by the Holy Ghost, which illuminateth the Church to the end of the world.

[1] perfect interpreter, as also fulfiller, of the law. R.

That in the fulness of time, according to the promise and oath of God[1], of a chosen linage descended the blessed seed of the woman, Jesus Christ, the only begotten Son of God and Saviour of the world; who was conceived by the power and overshadowing of the Holy Ghost, and took flesh of the Virgin Mary: that the Word did not only take flesh, or was joined to flesh, but was made flesh, though without confusion of substance or nature: so as the eternal Son of God and the ever blessed Son of Mary was one person; so one, as the blessed Virgin may be truly and catholicly called *Deipara*, the Mother of God; so one, as there is no unity in universal nature, not that of the soul and body of man, so perfect; for the three heavenly unities (whereof that is the second) exceed all natural unities: that is to say, the unity of the three persons in Godhead; the unity of God and Man in Christ; and the unity of Christ and the Church: the Holy Ghost being the worker of both these latter unities; for by the Holy Ghost was Christ incarnate and quickened in flesh; and by the Holy Ghost is man regenerate and quickened in spirit.

That Jesus the Lord became in the flesh a sacrificer and sacrifice for sin; a satisfaction and price to the justice of God; a meriter of glory and the kingdom; a pattern of all righteousness; a preacher of the word which himself was; a finisher of the ceremony; a corner-stone to remove the separation between Jew and Gentile; an intercessor for the Church; a Lord of Nature in his miracles; a conqueror of death and the power of darkness in his resurrection; and that he fulfilled the whole counsel of God, performed his whole sacred offices[2] and anointing on earth, accomplished the whole work of the redemption and restitution of man to a state superior to the Angels, whereas the state of his creation[3] was inferior; and reconciled or[4] established all things according to the eternal will of the Father.

That in time, Jesus the Lord was born in the days of Herod, and suffered under the government of Pontius Pilate, being deputy of the Romans, and under the high priesthood of Caiaphas, and was betrayed by Judas, one of the twelve apostles, and was crucified at Jerusalem[5], and after a true and natural death, and his body laid in the sepulchre, the third day he raised himself

[1] R. omits "of God."
[2] all his sacred offices. R. MS. 4263. has "his holy sacred office."
[3] of man by creation. R. [4] and. R. [5] Hierusalem. R.

from the bonds of death, and arose and shewed himself to many chosen witnesses, by the space of divers days; and at the end of those days, in the sight of many, ascended into heaven; where he continueth his intercession; and shall from thence at the day appointed come in greatest glory to judge the world.

That the sufferings and merits of Christ, as they are sufficient to do away the sins of the whole world, so they are only effectual to those that[1] are regenerate by the Holy Ghost; who breatheth where he will of free grace; which grace, as a seed incorruptible, quickeneth the spirit of man, and conceiveth him anew the son of God and the member[2] of Christ: so that Christ having man's flesh, and man having Christ's spirit, there is an open passage and mutual imputation; whereby sin and wrath is[3] conveyed to Christ from man, and merit and life is conveyed to man from Christ: which seed of the Holy Ghost first figureth in us the image of Christ slain or crucified, in[4] a lively faith; and then reneweth in us the image of God in holiness and charity; though both imperfectly, and in degrees far differing even in God's elect, as well in regard of the fire of the Spirit, as of the illumination[5], which is more or less in a large proportion: as namely, in the Church before Christ; which yet nevertheless was partaker of one and the same salvation[6] and one[7] and the same means of salvation with us.

That the work of the Spirit, though it be not tied to any means in heaven or earth, yet it is ordinarily dispensed by the preaching of the word, the administration of the sacraments, the covenant[8] of the fathers upon the children, prayer, reading, the censures of the Church, the society of the godly, the cross and afflictions, God's benefits, his judgments upon others, miracles, the contemplation of his creatures, all which (though some be more principal) God useth as the means of vocation and conversion of his elect; not derogating from his power to call immediately by his grace, and at all hours and moments of the day (that is, of man's life), according to his good pleasure.

That the word of God, whereby his will is revealed, continued in revelation and tradition until Moses; and that the Scriptures were from Moses' times[9] to the times of the Apostles and

[1] which. R. [2] a son of God and member. R. [3] was. R.
[4] through. R. [5] illumination thereof. R. [6] salvation with us. R.
[7] and of one. R. [8] covenants. R.
[9] time. R. I suspect that a clause has been lost here, stating *what* the Scriptures were. But there is no indication of it in any of the MSS.

Evangelists; in whose age, after the coming of the Holy Ghost, the teacher of all truth, the book of the Scriptures is shut and closed, as[1] to receive any new addition; and that the Church hath no power over the Scriptures to teach or command anything contrary to the written word, but is as the Ark, wherein the tables of the first testament were kept and preserved: that is to say, the Church hath only the custody and delivery over of the Scriptures committed unto the same; together with the interpretation of them.[2]

That there is an universal or catholic Church of God, dispersed over the face of the earth; which is Christ's spouse, and Christ's body; being gathered of the fathers of the old world, of the Church of the Jews, of the spirits of the faithful dissolved, of[3] the spirits of the faithful militant, and of the names yet to be born, which are already written in the book of life. That there is also a visible Church, distinguished by the outward works of God's covenant, and the receiving of the holy doctrine, with the use of the mysteries of God, and the invocation and sanctification of his holy name. That there is also a holy succession in the prophets of the new testament and fathers of the Church, from the time of the apostles and disciples which saw our Saviour in the flesh, unto the consummation of the work of the ministry; which persons are called from God by gift, or inward anointing, and the vocation of God followed by an outward calling and ordination of the Church.

I believe that the souls of those that die in the Lord are blessed, and rest from their labours, and enjoy the sight of God, yet so as they are in expectation of a further revelation of their glory in the last day; at which time all flesh of man shall arise and be changed, and shall appear and receive from Jesus Christ his eternal judgment; and the glory of the saints shall then be full, and the kingdom shall be given up to God the Father, from which time all things shall continue for ever in that being and state which they shall receive[4]; so as there are three times (if times they may be called) or parts of eternity: The first, the time before beginnings, when the Godhead was only, without

[1] was shut and closed so as not. R. Probably a conjectural correction; but not wanted. "as to receive" means "with regard to the receiving."
[2] but such only as is conceived from themselves. R.
[3] and. R.
[4] which then they shall receive. R

the being of any creature: The second, the time of the mystery, which continueth from the time of creation [1] to the dissolution of the world: And the third, the time of the revelation of the sons of God; which time is the last, and is everlasting without change.

[1] from the creation. R.

MEDITATIONES SACRÆ.

PREFACE.

THE *Meditationes Sacræ* were written by Bacon in Latin, and published in 1597 in the same volume with the *Essays* and the *Colours of Good and Evil.* This volume was reprinted the next year by the same publisher (whether with Bacon's knowledge and sanction or not, does not appear) — only that an English translation of the *Meditationes Sacræ,* under the title of *Religious Meditations,* was substituted for the original Latin. The translation is upon the whole good, and may well enough have had Bacon's *imprimatur,* though I can hardly think it was his own doing; the rather because, though it was afterwards included in all those editions of the Essays which, being merely reprints, may be supposed to have been printer's speculations in which he took no concern, I do not find in any volume subsequently brought out by himself either the translation or the original. Of the original indeed, which had not been reprinted, he may possibly in later years have been unable to procure a copy: but if he ever cared enough for it to translate it into English with his own hand, it seems unlikely that he should not have cared to preserve the translation. I suppose he added it to his Essays of 1597 in order to make that very thin volume a little thicker; but afterwards, judging it too slight a thing to stand by itself under such a title, preferred to disperse through his other writings such of the thoughts as he considered worth preserving.

However this may be, there is something in these Meditations very characteristic, and as a sample of what at the age of 37 he thought worth setting down on such subjects, they cannot but be read with interest: none more so perhaps than the meditation *de spe terrestri*—the doctrine of which is not propounded by him elsewhere, as far as I recollect; certainly not in such latitude. The aphorism attributed to Heraclitus, that *dry light is the best soul,* was indeed at all times a favourite with him. But I do not think that he has anywhere else made

so resolute an attempt to translate it into a practical precept for the regulation of the mind, and fairly to follow to its legitimate consequences the doctrine that absolute veracity and freedom from all delusion is the only sound condition of the soul. Upon this principle, a reasonable expectation of good to come, formed upon a just estimate of probabilities, is the only kind of *hope* which in the things of this life a man is permitted to indulge: all hope that goes beyond this being to be reserved for the life to come. The spirit of hope must have been strong in Bacon himself, if at the age of 37 he could still believe it possible for man to walk by the light of reason alone. I suppose it did not hold out much longer. His own experience must have taught him that had he never hoped to do more than he succeeded in doing, he could never have had spirit to proceed; and that to reduce hope within the limits of reasonable expectation would be to abjure the *possunt quia posse videntur*, and to clip the wings of enterprise: and he learned before he died to recommend the "entertaining of hopes" as one of the best medicines for the preservation of health.

The seeds or rough notes of this meditation may be seen fairly written in Bacon's own hand in a loose sheet belonging to the bundle which I have described under the head of *Formularies and Elegancies:* Harl. MSS. 7017. fo. 118. And as those who are curious about his smaller habits and methods of working may like to see it, I subjoin a copy.

Melior est oculorum visio quam animi progressio.

Spes in dolio remansit, sed non ut antidotus, sed ut major morbus.

Spes omnis in futuram vitam consumenda est: Sufficit præsentibus bonis purus sensus.

Spes vigilantis somnium: Vitæ summa brevis spem nos vetat inchoare longam.

Spes facit animos leves, tumidos, inæquales, peregrinantes.

Vidi universos ambulantes sub sole cum adolescente secundo qui consurget post eum.

Imaginationes omnia turbant, timores multiplicant, voluptates corrumpunt.

Anticipatio timoris salubris, ob inventionem remedii; spei inutilis.

Imminent futuro, ingrati in præteritum, semper adolescentes.

Vitam sua sponte fluxam magis fluxam reddimus per continuationes spei.

Præsentia erunt futura, non contra.

MEDITATIONES SACRÆ.

LONDINI.
Excudebat Johannes Windet.
1597

1. De Operibus Dei et Hominis.
2. De Miraculis Servatoris.
3. De Columbina Innocentia et Serpentina Prudentia.
4. De Exaltatione Charitatis.
5. De Mensura Curarum.
6. De Spe Terrestri.
7. De Hypocritis.
8. De Impostoribus.
9. De Generibus Impostura.
10. De Atheismo.
11. De Hæresibus.
12. De Ecclesia et Scripturis.

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MEDITATIONES SACRÆ.

DE OPERIBUS DEI ET HOMINIS.

Vidit Deus omnia quæ fecerant manus ejus, et erant bona nimis: homo autem conversus ut videret opera quæ fecerunt manus ejus, invenit quod omnia erant vanitas et vexatio spiritus.[1]

Quare si opera Dei operaberis, sudor tuus ut unguentum aromatum, et feriatio tua ut Sabbatum Dei. Laborabis in sudore bonæ conscientiæ, et feriabere in otio suavissimæ contemplationis. Si autem post magnalia hominum persequeris, erit tibi in operando stimulus et angustia, et in recordando fastidium et exprobratio. Et merito tibi evenit (O homo) ut cum tu qui es opus Dei non retribuas ei beneplacentiam, etiam opera tua reddant tibi fructum similem amaritudinis.

DE MIRACULIS SERVATORIS.

Bene omnia fecit.

Verus plausus: Deus cum universa crearet, vidit quod singula et omnia erant bona nimis. Deus verbum in miraculis quæ edidit (omne autem miraculum est nova creatio, et non ex lege primæ creationis) nil facere voluit quod non gratiam et beneficentiam omnino spiraret. Moses edidit miracula, et profligavit Ægyptios pestibus multis; Elias edidit, et occlusit cœlum ne plueret super terram; et rursus eduxit de cœlo ignem Dei super duces et cohortes; Elizeus edidit, et evocavit ursas e deserto quæ laniarent impuberes; Petrus Ananiam sacrilegum hypocritam morte, Paulus Elimam magum cæcitate percussit:

[1] This paragraph is not printed in a distinct type in the original, as the corresponding paragraphs in the other meditations are. But the printing is in this respect careless throughout; and there can be little doubt that it was meant to stand as a text prefixed to the meditation.

Sed nihil hujusmodi fecit Jesus. Descendit super eum spiritus in forma columbæ, de quo dixit, *Nescitis cujus spiritus sitis;* spiritus Jesus, spiritus columbinus: fuerunt illi servi Dei tanquam boves Dei triturantes granum, et conculcantes paleam; sed Jesus Agnus Dei sine ira et judiciis. Omnia ejus miracula circa corpus humanum, et doctrina ejus circa animam humanam. Indiget corpus hominis alimento, defensione ab externis, et cura. Ille multitudinem piscium in retibus congregavit, ut uberiorem victum hominibus præberet. Ille alimentum aquæ in dignius alimentum vini ad exhilarandum cor hominis convertit. Ille ficum, quod officio suo ad quod destinatum fuit, ad cibum hominis videlicet, non fungeretur, arefieri jussit. Ille penuriam piscium et panum ad alendum exercitum populi dilatavit. Ille ventos quod navigantibus minarentur corripuit. Ille claudis motum, cæcis lumen, mutis sermonem, languidis sanitatem, leprosis carnem mundam, dæmoniacis animum integrum, mortuis vitam restituit. Nullum miraculum judicii, omnia beneficentiæ, et circa corpus humanum; nam circa divitias non est dignatus edere miracula; nisi hoc unicum, ut tributum daretur Cæsari.

DE COLUMBINA INNOCENTIA ET SERPENTINA PRUDENTIA.

Non accipit stultus verba prudentiæ, nisi ea dixeris quæ versantur in corde ejus.

Judicio hominis depravato et corrupto, omnis quæ adhibetur eruditio et persuasio irrita est et despectui, quæ non ducit exordium a detectione et repræsentatione malæ complexionis animi sanandi; quemadmodum inutiliter adhibetur medicina non pertentato vulnere. Nam homines malitiosi, qui nihil sani cogitant, præoccupant hoc sibi, ut putent bonitatem ex simplicitate morum ac inscitia quadam et imperitia rerum humanarum gigni. Quare, nisi perspexerint ea quæ versantur in corde suo, id est penitissimas latebras malitiæ suæ, perlustratas esse ei qui suasum molitur, de ridiculo habent verba prudentiæ. Itaque ei qui ad bonitatem aspirat non solitariam et particularem, sed seminalem et genitivam quæ alios trahat, debent esse omnino nota quæ ille vocat *Profunda Satanæ;* ut loquatur cum auctoritate et insinuatione vera. Hinc est illud, *Omnia probate, quod bonum est tenete;* inducens electionem judiciosam ex generali examinatione. Ex eodem fonte est illud; *Estote prudentes sicut serpentes,*

innocentes sicut columbæ. Non est dens serpentis, nec venenum, nec aculeus, quæ non probata debeant esse; nec pollutionem quis timeat, nam et sol ingreditur latrinas, nec inquinatur; nec quis se Deum tentare credat, nam ex præcepto est, *et sufficiens est Deus ut vos immaculatos custodiat.*

DE EXALTATIONE CHARITATIS.

Si gavisus sum ad ruinam ejus qui oderat me, et exaltavi quod invenisset eum malum.

Detestatio Job; amicos redamare, est charitas publicanorum ex fœdere utilitatis; versus inimicos autem bene animatos esse, est ex apicibus juris Christiani, et imitatio divinitatis. Rursus tamen hujus charitatis complures sunt gradus, quorum primus est inimicis resipiscentibus ignoscere; ac hujus quidem charitatis etiam apud generosas feras umbra quædam et imago reperitur; nam et leones in se submittentes et prosternentes non ulterius sævire perhibentur. Secundus gradus est inimicis ignoscere, licet sint duriores, et absque reconciliationum piaculis. Tertius gradus est non tantum veniam et gratiam inimicis largiri, sed etiam merita et beneficia in eos conferre. Sed habent hi gradus, aut habere possunt, nescio quid potius ex ostentatione, aut saltem animi magnitudine, quam ex charitate pura. Nam cum quis virtutem ex se emanare et effluere sentit, fieri potest ut is efferatur, et potius virtutis suæ fructu quam salute et bono proximi delectetur. Sed si aliunde malum aliquod inimicum tuum deprehendat, et tu in interioribus cellulis cordis graveris et angustieris, nec, quasi dies ultionis et vindictæ tuæ advenisset, læteris; hoc ego fastigium et exaltationem charitatis esse pono.

DE MENSURA CURARUM.

Sufficit diei malitia sua.

Modus esse in curis humanis debet; alioqui et inutiles sunt, ut quæ animum opprimant et judicium confundant, et profanæ, ut quæ sapiant animum qui perpetuitatem quandam in rebus mundanis sibi spondeat. Hodierni enim debemus esse ob brevitatem ævi, et non crastini, sed, ut ille ait, *carpentes diem;* erunt enim futura præsentia vice sua; quare sufficit solicitudo præ-

sentium. Neque tamen curæ moderatæ, sive sint œconomicæ, sive publicæ, sive rerum mandatarum, notantur. Sed hic duplex est excessus. Primus, cum curarum series in longitudinem nimiam et tempora remotiora extendimus, ac si providentiam divinam apparatu nostro ligare possemus; quod semper etiam apud Ethnicos infaustum et insolens fuit. Fere enim qui fortunæ multum tribuerunt, et ad occasiones præsentes alacres et præsto fuerunt, felicitate magna usi sunt. Qui autem altum sapientes, omnia curata et meditata habere confisi sunt, infortunia subierunt. Secundus excessus est, cum in curis immoramur diutius quam opus est ad justam deliberationem et ad decretum faciendum. Quis enim nostrûm est, qui tantum curet quantum sufficit ut se explicet, vel sese explicare non posse judicet, et non eadem sæpe retractet, et in eodem cogitationum circuitu inutiliter hæreat, et denique evanescat? Quod genus curarum et divinis et humanis rationibus adversissimum est.

DE SPE TERRESTRI.

Melior est oculorum visio, quam animi progressio.

Sensus purus in singula meliorem reddit conditionem et politiam mentis, quam istæ imaginationes et progressiones animi. Natura enim animi humani, etiam in ingeniis gravissimis, est ut a sensu singulorum statim progrediatur et saliat, et omnia auguretur fore talia quale illud est quod præsentem sensum incutit: si boni est sensus, facilis est ad spem indefinitam; si mali est sensus, ad metum: unde illud, *Fallitur augurio spes bona sæpe suo;* et contra illud, *Pessimus in dubiis augur timor.*[1] Sed tamen timoris est aliquis fructus; præparat enim tolerantiam, et acuit industriam:

> Non ulla laborum,
> O virgo, nova mi facies inopinave surgit:
> Omnia præcepi, atque animo mecum ante peregi.

Spes vero inutile quiddam videtur. Quorsum enim ista anticipatio boni? Attende: si minus eveniat bonum quam speres, bonum licet sit, tamen quia minus sit, videtur damnum potius quam lucrum, ob excessum spei. Si par et tantum sit, et

[1] *timor* is omitted in the original: no doubt by accident. The error was corrected by M. Bouillet; who gives the reference, *Statius*, *Theb.* lib. iii. v. 6.

eventus sit spei æqualis, tamen flos boni per spem decerpitur, et videtur fere obsoletum, et fastidio magis finitimum. Si major sit successus spe, videtur aliquid lucri factum; verum est: sed annon melius fuisset sortem lucrifecisse nihil sperando, quam usuram minus sperando? Atque in rebus secundis ita operatur spes; in malis autem robur verum animi solvit. Nam neque semper spei materia suppetit, et destitutione aliqua vel minima spei, universa fere firmitudo animi corruit; et minorem efficit dignitatem mentis, cum mala toleramus alienatione quadam et errore mentis, non fortitudine et judicio. Quare satis leviter finxere poëtæ spem antidotum humanorum morborum esse, quod dolores eorum mitiget, cum sit revera incensio potius et exasperatio, quæ eos multiplicari et recrudescere faciat. Nihilominus fit, ut plerique hominum imaginationibus spei et progressionibus istis mentis omnino se dedant, ingratique in præterita, obliti fere præsentium, semper juvenes, tantum futuris immineant. *Vidi universos ambulantes sub sole cum adolescente secundo, qui consurget post eum; quod pessimus morbus est, et status mentis insanissimus.* Quæras fortasse annon melius sit, cum res in dubia expectatione positæ sint, bene divinare, et potius sperare quam diffidere, cum spes majorem tranquillitatem animi conciliet. Ego sane in omni mora et expectatione tranquillum et non fluctuantem animi statum, ex bona mentis politia et compositione, summum humanæ vitæ firmamentum judico: sed eam tranquillitatem, quæ ex spe pendeat, ut levem et infirmam recuso. Non quia non conveniat tam bona quam mala ex sana et sobria conjectura prævidere et præsupponere, ut actiones ad probabilitatem eventuum magis accommodemus; modo sit hoc officium intellectus ac judicii cum justa inclinatione affectus. Sed quem[1] ita spes coërcuit, ut cum ex vigilanti et firmo mentis discursu meliora, ut magis probabilia, sibi prædixerit, non in ipsa boni anticipatione immoratus sit, et hujusmodi cogitationi, ut somnio placido, indulserit? Atque hoc est quod reddit animum levem, tumidum, inæqualem, peregrinantem. Quare omnis spes in futuram vitam cœlestem consumenda est. Hic autem, quanto purior sit præsentium sensus, absque infectione et tinctura imaginationis, tanto prudentior et melior anima. *Vitæ summa brevis spem nos vetat inchoare longam.*

[1] So in the original. One would rather have expected *quis*; as the translator appears to have read it: "but which of you hath so kept his hopes within limits," &c.

DE HYPOCRITIS.

Misericordiam volo, et non sacrificium.

Omnis jactatio Hypocritarum est in operibus primæ tabulæ legis, quæ est de venerationibus Deo debitis. Ratio duplex est, tum quod hujusmodi opera majorem habent pompam sanctitatis, tum quod cupiditatibus eorum minus adversentur. Itaque redargutio hypocritarum est, ut ab operibus sacrificii remittantur ad opera misericordiæ; unde illud, *Religio munda et immaculata apud Deum et patrem hæc est, visitare pupillos et viduas in tribulatione eorum;* et illud, *Qui non diligit fratrem suum quem vidit, Deum quem non vidit quomodo potest diligere?* Quidam autem altioris et inflatioris hypocrisiæ[1], seipsos decipientes et existimantes se arctiore cum Deo conversatione dignos, officia charitatis in proximum ut minora negligunt. Qui error monasticæ vitæ non principium quidem dedit (nam initia bona fuerunt), sed excessum addidit. Recte enim dictum est, *Orandi munus magnum esse munus in ecclesia;* et ex usu ecclesiæ est, ut sint cœtus hominum a mundanis curis soluti, qui assiduis et devotis precibus Deum pro ecclesiæ statu sollicitent. Sed huic ordinationi illa hypocrisia finitima est; nec universa institutio reprobatur, sed spiritus illi se efferentes cohibentur: nam et Enoch, qui ambulavit cum Deo, prophetizavit, ut est apud Judam, atque fructu suæ prophetiæ ecclesiam donavit. Et Johannes Baptista, quem principem quidam vitæ monasticæ volunt, multo ministerio functus est tum prophetizationis tum baptizationis. Nam ad alios istos in Deum officiosos refertur illa interrogatio, *Si juste egeris, quid donabis Deo, aut quid de manu tua accipiet?* Quare opera misericordiæ sunt opera discretionis hypocritarum. Contra autem fit cum hæreticis; nam ut hypocritæ, simulata sua sanctitate versus Deum, injurias suas versus homines obducunt; ita hæretici, moralitate quadam versus homines, blasphemias suas contra Deum insinuant.

DE IMPOSTORIBUS.

Sive mente excedimus, Deo, sive sobrii sumus vobis.

Vera est ista effigies et verum temperamentum viri cui religio penitus in præcordiis insedit, et veri operarii Dei. Conversatio ei quæ cum Deo est, plena excessus, et zeli, et extasis.

[1] So in the original: as also *hypocrisia* a few lines further on: and therefore, I presume, not a misprint.

Hinc gemitus ineffabiles et exultationes, et raptus spiritus, et agones. At quæ cum hominibus est, plena mansuetudinis, et sobrietatis, et morigerationis. Hinc *omnia omnibus factus sum*, et hujusmodi. Contra fit in hypocritis et impostoribus: ii enim in populo et ecclesia incendunt se et excedunt, et veluti sacris furoribus afflati omnia miscent. Si quis autem eorum solitudines, et separatas meditationes, et cum Deo conversationes introspiciat, deprehendet eas non tantum frigidas et sine motu, sed plenas malitiæ et fermenti; sobrii Deo, mente excedentes populo.

DE GENERIBUS IMPOSTURÆ.

Devita prophanas vocum novitates, et oppositiones falsi nominis scientiæ.

Ineptas et aniles fabulas devita.

Nemo vos decipiat in sublimitate sermonum.

Tres sunt sermones et veluti stili imposturæ. Primum genus est eorum, qui statim ut aliquam materiam nacti sunt, artem conficiunt, vocabula artis imponunt, omnia in distinctiones redigunt, inde posita vel themata educunt, et ex quæstionibus et responsionibus oppositiones conficiunt: hinc Scholasticorum quisquiliæ et turbæ. Secundum genus est eorum, qui vanitate ingenii, ut sacri quidem poëtæ, omnem exemplorum varietatem ad mentes hominum tractandas confingunt: unde vitæ patrum, et antiquorum hæreticorum figmenta innumera. Tertium genus eorum, qui mysteriis et grandiloquiis, allegoriis et allusionibus omnia implent: quod genus mysticum et gnosticum complures hæretici sibi delegerunt. Primum genus sensum et captum hominis illaqueat, secundum allicit, tertium stupefacit; seducunt vero omnia.

DE ATHEISMO.

Dixit insipiens in corde suo, non est Deus.

Primum, dixit in corde; non ait, cogitavit in corde; hoc est, non tam ita sentit penitus, sed vult hoc credere: quoniam expedire sibi videt ut non sit Deus, omni ratione sibi hoc suadere et in animum inducere conatur: et tanquam thema aliquod, vel positum, vel placitum, asserere et adstruere et firmare studet. Manet tamen ille igniculus luminis primi, quo divinitatem agnoscimus, quem prorsus extinguere et stimulum illum ex corde evellere frustra nititur. Quare ex malitia voluntatis suæ,

et non ex nativo sensu et judicio, hoc supponit; ut ait comicus poëta, *Tunc animus meus accessit ad meam sententiam*, quasi ipse alter esset ab animo suo. Itaque Atheista magis dixit in corde, quam sentit in corde, quod non sit Deus. Secundo, dixit in corde, non ore locutus est; sed notandum est hoc metu legis et famæ fieri. Nam ut ait ille, *Negare Deos difficile est in concione populi, sed in consessu familiari expeditum.* Nam si hoc vinculum tollatur e medio, non est hæresis, quæ majore studio se pandere et spargere et multiplicare nitatur, quam Atheismus. Nec videas eos qui in hanc mentis insaniam immersi sunt aliud fere spirare, et importune inculcare, quam verba atheismi: ut in Lucretio Epicureo, qui fere suam in religionem invectivam singulis aliis subjectis intercalarem facit. Ratio videtur esse, quod Atheista, cum sibi non satis acquiescat, æstuans, nec sibi satis credens, et crebra suæ opinionis deliquia in interioribus patiens, ab aliorum assensu refocillari cupit. Nam recte dictum est: *Qui alteri opinionem approbare sedulo cupit, ipse diffidit.* Tertio, insipiens est, qui hoc in corde dixit; quod verissimum est, non tantum quod divina non sapiat, sed etiam secundum hominem. Primo enim ingenia quæ sunt in atheismum proniora, videas fere levia, et dicacia, et audacula, et insolentia: ejus denique compositionis, quæ prudentiæ et gravitati morum adversissima est. Secundo, inter viros politicos, qui altioris ingenii et latioris cordis fuerunt religionem non arte quadam ad populum adhibuerunt, sed interiore dogmate coluere, ut qui providentiæ et fortunæ plurimum tribuerint. Contra, qui artibus suis et industriis, et causis proximis et apparentibus omnia ascripserunt, et, ut ait propheta, *retibus suis immolarunt*, pusilli fuerunt politici, et circumforanei, et magnitudinis actionum incapaces. Tertio, in physicis et illud affirmo, parum philosophiæ naturalis, et in ea progressum liminarem, ad Atheismum opiniones inclinare: contra, multum philosophiæ naturalis, et progressum in ea penetrantem, ad religionem animos circumferre. Quare Atheismus stultitiæ et inscitiæ ubique convictus esse videtur, ut merito sit dictum insipientium, *Non est Deus.*

DE HÆRESIBUS.

Erratis, nescientes Scripturas, neque potestatem Dei.

Canon iste mater omnium canonum adversus hæreses. Duplex erroris causa, ignoratio voluntatis Dei, et ignoratio vel levior

contemplatio potestatis Dei. Voluntas Dei revelatur magis per scripturas, *Scrutamini;* potestas magis per creaturas, *Contemplamini.* Ita asserenda plenitudo potestatis Dei, ne maculemus voluntatem. Ita asserenda bonitas voluntatis, ne minuamus potestatem. Itaque religio vera sita est in mediocritate, inter superstitionem cum hæresibus superstitiosis ex una parte, et atheismum cum hæresibus prophanis ex altera. Superstitio, repudiata luce scripturarum, seque dedens traditionibus pravis vel apocryphis, et novis revelationibus, vel falsis interpretationibus scripturarum, multa de voluntate Dei fingit et somniat, a scripturis devia et aliena. Atheismus autem et theomachia contra potestatem Dei insurgit et tumultuatur, verbo Dei non credens, quod voluntatem ejus revelat, ob incredulitatem potestatis ejus, cui omnia sunt possibilia. Hæreses autem, quæ ex isto fonte emanant, graviores videntur cæteris. Nam et in politiis atrocius est potestatem et majestatem minuere, quam famam principis notare. Hæresium autem quæ potestatem Dei minuunt, præter atheismum purum tres sunt gradus, habentque unum et idem mysterium (nam omnis antichristianismus operatur in mysterio, id est, sub imagine boni;) hoc ipsum, ut voluntatem Dei ab omni aspersione malitiæ liberent. Primus gradus est eorum, qui duo principia constituunt paria, ac inter se pugnantia et contraria, unum boni, alterum mali. Secundus gradus est eorum, quibus nimium læsa videtur majestas Dei, in constituendo adversus eum principio affirmativo et activo: quare exturbata tali audacia, nihilominus inducunt contra Deum principium negativum et privativum. Nam volunt esse opus ipsius materiæ et creaturæ internum et nativum et substantivum, ut ex se vergat et relabatur ad confusionem et ad nihilum; nescientes ejusdem esse omnipotentiæ ex aliquo nihil facere, cujus ex nihilo aliquid. Tertius gradus est eorum, qui arctant et restringunt opinionem priorem tantum ad actiones humanas, quæ participant ex peccato, quas volunt substantive, absque nexu aliquo causarum, ex interna voluntate et arbitrio humano pendere; statuuntque latiores terminos scientiæ Dei quam potestatis, vel potius ejus partis potestatis Dei (nam et ipsa scientia potestas est) qua scit, quam ejus qua movet et agit; ut præsciat quædam otiose, quæ non prædestinet et præordinet. Et non absimile est figmento quod Epicurus introduxit in Democritismum, ut fatum tolleret et fortunæ locum daret; declinationem videlicet atomi; quod semper a prudentioribus inanissimum commentum habitum

est. Sed quidquid a Deo non pendet, ut authore et principio, per nexus et gradus subordinatos, id loco Dei erit, et novum principium, et deaster quidam. Quare merito illa opinio respuitur, ut læsio et diminutio majestatis et potestatis Dei. Et tamen admodum recte dicitur quod *Deus non sit author mali*, non quia non author, sed quia non mali.

DE ECCLESIA ET SCRIPTURIS.

Proteges eos in tabernaculo tuo a contradictione linguarum.

Contradictiones linguarum ubique occurrunt, extra tabernaculum Dei. Quare quocunque te verteris, exitum controversiarum non reperies nisi huc te receperis. Dices, verum est, nempe in unitatem ecclesiæ. Sed adverte. Erat in tabernaculo arca, et in arca testimonium vel tabulæ legis. Quid mihi narras corticem tabernaculi, sine nucleo testimonii? Tabernaculum ad custodiendum et tradendum testimonium erat ordinatum. Eodem modo et ecclesiæ custodia et traditio per manus scripturarum demandata est, sed anima tabernaculi est testimonium.

RELIGIOUS MEDITATIONS.

OF THE WORKS OF GOD AND THE WORKS OF MAN.

God saw all that he had made and behold it was very good: But man when he turned to look on the works that his hands had wrought, found that all was vanity and vexation of spirit.

Wherefore if thou labour in God's works, thy sweat shall be as a sweet ointment, and thy rest as the Sabbath of God: thou shalt labour in the sweat of a good conscience, and thou shalt take rest in the leisure of delightful contemplation. But if thou follow after the mighty things of men, thou shalt work in pain and distress, and thou shalt look back upon thy work with disgust and reproach. And justly doth it happen to thee, O man, that seeing thou thyself that art the work of God requitest him not with well pleasing, even so thine own works bear thee the like fruit of bitterness.

OF THE MIRACLES OF OUR SAVIOUR.

He hath done all things well.

A true applause. God, when he created all things, saw that each and all was exceeding good. God the Word, in the miracles which he wrought (and every miracle is a new creation, and not according to the law of the first creation), would do nothing that was not altogether matter of grace and beneficence. Moses wrought miracles, and destroyed the Egyptians with many plagues: Elijah wrought miracles, and shut up heaven that no rain should fall upon the earth; and again called down

fire from heaven to consume the captains and their fifties: Elisha wrought miracles, and brought she-bears out of the wood to tear the little children: Peter smote Ananias the sacrilegious hypocrite with death; Paul, Elymas the Sorcerer with blindness. But nothing of this kind was done by Jesus. Upon him the spirit descended in the form of a dove; whereof he said, *ye know not of what spirit ye are.* The spirit of Jesus was the spirit of the dove. Those servants of God were as God's oxen, treading out the corn and trampling the chaff under their feet; Jesus was the Lamb of God, without wrath or judgments. All his miracles were for the benefit of the human body, his doctrine for the benefit of the human soul. The body of man stands in need of nourishment, of defence from outward accidents, of medicine. He gathered the multitude of fishes into the nets, whereby to supply men with more plentiful food. He turned water into the worthier nourishment of wine, to glad man's heart. He caused the fig tree, because it failed of its appointed office (that of yielding food for man), to wither away. He multiplied the scanty store of loaves and fishes that the host of people might be fed. He rebuked the winds because they threatened danger to them that were in the ship. He restored motion to the lame, light to the blind, speech to the dumb, health to the sick, cleanness to the lepers, sound mind to them that were possessed of devils, life to the dead. There was no miracle of judgment, but all of mercy, and all upon the human body. For with reference to riches, he deigned not to work any miracles; except that one about giving tribute to Cæsar.

OF THE INNOCENCY OF THE DOVE AND THE WISDOM OF THE SERPENT.

The fool receiveth not the word of wisdom, except thou discover to him what he hath in his heart.

To a man of perverse and corrupt judgment all instruction or persuasion is fruitless and contemptible which begins not with discovery and laying open of the distemper and ill complexion of the mind which is to be recured: as a plaster is unseasonably applied before the wound be searched. For men of corrupt understanding, that have lost all sound discerning of good and evil, come possessed with this prejudicate opinion, that they

think all honesty and goodness proceedeth out of a simplicity of manners, and a kind of want of experience and unacquaintance with the affairs of the world. Therefore except they may perceive those things which are in their hearts, that is to say their own corrupt principles and the deepest reaches of their cunning and rottenness, to be throughly sounded and known to him that goes about to persuade with them, they make but a play of the words of wisdom. Therefore it behoveth him which aspireth to a goodness not retired or particular to himself, but a fructifying and begetting goodness, which should draw on others, to know those points which be called in the Revelation *the deeps of Satan;* that he may speak with authority and true insinuation. Hence is the precept: *Try all things, and hold that which is good:* which induceth a discerning election out of an examination whence nothing at all is excluded. Out of the same fountain ariseth that direction: *Be you wise as Serpents, and innocent as Doves.* There are neither teeth nor stings, nor venom, nor wreaths and folds of serpents, which ought not to be all known, and as far as examination doth lead, tried: neither let any man here fear infection or pollution; for the sun entereth into sinks and is not defiled. Neither let any man think that herein he tempteth God; for his diligence and generality of examination is commanded; and *God is sufficient to preserve you immaculate and pure.*[1]

OF THE EXALTATION OF CHARITY.

If I rejoiced at the destruction of him who hated me, and lifted up myself when evil found him.

The protestation of Job. To love them that love us is the charity of the Publicans, upon contract of utility: but to be kindly disposed towards our enemies is one of the highest points of the Christian law, and an imitation of divinity. Yet again of this charity there are many degrees. Whereof the first is to forgive our enemies when they repent: and of this there is found even among the more generous kinds of wild beasts some shadow or image: for lions also are said to be no longer savage towards those who yield and prostrate themselves. The second

[1] I have here merely transcribed the old translation; which seems to me particularly well done, and being rather freer and fuller than the others, may possibly have some of Bacon's own hand in it.

degree is to forgive our enemies though they be more obstinate, and without offerings of reconciliation. The third degree is, not only to accord pardon and grace, but to confer upon them favours and benefits. Nevertheless all these degrees have, or may have, something in them of ostentation, or at least of magnanimity, rather than of pure charity. For when a man feels that virtue is proceeding from him, it may be that he feels a pride in it, and is taking delight more in the fruit of his own virtue than in the welfare and good of his neighbour. But if evil overtake your enemy from elsewhere, and you in the inmost recesses of your heart are grieved and distressed, and feel no touch of joy, as thinking that the day of your revenge and redress has come; — this I account to be the summit and exaltation of Charity.

OF MODERATION OF CARES.

Sufficient unto the day is the evil thereof.

There ought to be a measure kept in human cares. Else are they both unprofitable, as oppressing the mind and confounding the judgment; and profane, as savouring of a mind which promises to itself a kind of perpetuity in things of this world. For we ought to be creatures of to-day, by reason of the shortness of life, not of to-morrow: but, as he says, *seizing the present time:* for to-morrow will have its turn and become to-day: and therefore it is enough if we take thought for the present. Not that moderate cares, whether for a man's family or for the public or for business committed to his charge, are reprehended. But herein is a two-fold excess. The first, when we carry our cares to too great length and into times too far off, as if we could bind divine providence by our arrangements; a thing which even among the Heathen was ever held insolent and unlucky. For it has commonly been seen that those who have attributed much to fortune and held themselves alert and vigilant to use occasions as they present themselves, have enjoyed great prosperity; whereas deep schemers who have trusted to have all things cared for and considered, have been unfortunate. The second kind of excess is, when we dwell on our cares longer than is necessary for just deliberation and decision. For which of us is there who cares only so much as is necessary

that he may know what to do, or know that he can do nothing: and does not turn the same things over and over in his mind, and hang uselessly in the same circle of cogitations, till he loses himself in them? Which kind of cares is most adverse both to divine and human considerations.

OF EARTHLY HOPE.

Better is the sight of the eyes than the wandering of the desire.

The sense which takes everything simply as it is makes a better mental condition and estate than those imaginations and wanderings of the mind. For it is the nature of the human mind, even in the gravest wits, the moment it receives an impression of anything, to sally forth and spring forward and expect to find everything else in harmony with it: if it be an impression of good, then it is prone to indefinite hope; if of evil, to fear. Whence it is said,

> By her own tales is Hope full oft deceived.

and on the other hand,

> In doubtful times Fear still forbodes the worst.

In fear however there is some advantage: it prepares endurance and sharpens industry.

> The task can show no face that's strange to me:
> Each chance I have pondered, and in thought rehearsed.

But in hope there seems to be no use. For what avails that anticipation of good? If the good turn out less than you hoped for, good though it be, yet because it is not *so* good, it seems to you more like a loss than a gain, by reason of the overhope. If neither more nor less, but so; the event being equal and answerable to the hope; yet the flower of it having been by that hope already gathered, you find it a stale thing and almost distasteful. If the good be beyond the hope, then no doubt there is a sense of gain: true: yet had it not been better to gain the whole by hoping not at all, than the difference by hoping too little? And such is the effect of hope in prosperity. But in adversity it enervates the true strength of the mind. For matter of hope cannot always be forthcoming; and if it fail, though but for a moment,

the whole strength and support of the mind goes with it. Moreover the mind suffers in dignity, when we endure evil only by self-deception and looking another way, and not by fortitude and judgment. And therefore it was an idle fiction of the poets to make Hope the antidote of human diseases, because it mitigates the pain of them; whereas it is in fact an inflammation and exasperation of them rather, multiplying and making them break out afresh. So it is nevertheless, that most men give themselves up entirely to imaginations of hope and these wanderings of the mind, and thankless for the past, scarce attending to the present, ever young, hang merely upon the future. *I beheld all that walk under the sun with the next youth that shall rise after him; which is a sore disease and a great madness of the mind.* You will ask perhaps if it be not better, when a man knows not what to expect, that he should divine well of the future, and rather hope than distrust, seeing that hope makes the mind more tranquil. Certainly in all delay and expectation to keep the mind tranquil and steadfast by the good government and composure of the same, I hold to be the chief firmament of human life; but such tranquillity as depends upon hope I reject, as light and unsure. Not but it is fit to foresee and presuppose upon sound and sober conjecture good things as well as evil, that we may the better fit our actions to the probable event: only this must be the work of the understanding and judgment, with a just inclination of the feeling. But who is there whose hopes are so ordered that when once he has concluded with himself out of a vigilant and steady consideration of probabilities that better things are coming, he has not dwelt upon the very anticipation of good, and indulged in that kind of thought as in a pleasant dream? And this it is which makes the mind light, frothy, unequal, wandering. Therefore all hope is to be employed upon the life to come in heaven: but here on earth, by how much purer is the sense of things present, without infection or tincture of imagination, by so much wiser and better is the soul.

Long hope to cherish in so short a span
Befits not man.

OF HYPOCRITES.

I will have mercy and not sacrifice.

The ostentation of hypocrites is ever confined to the works of the first table of the law, which prescribes our duties to God. The reason is twofold: both because works of this class have a greater pomp of sanctity, and because they interfere less with their desires. The way to convict a hypocrite therefore is to send him from the works of sacrifice, to the works of mercy. Whence the text: *Pure religion and undefiled before God and the Father is this, to visit the orphans and widows in their affliction;* and that other, *He who loveth not his brother whom he hath seen, how shall he love God whom he hath not seen?* There are some however of a deeper and more inflated hypocrisy, who deceiving themselves, and fancying themselves worthy of a closer conversation with God, neglect the duties of charity towards their neighbour, as inferior matters. By which error the life monastic was, not indeed originated (for the beginning was good), but carried into excess. For it is rightly said *that the office of prayer is a great office in the Church;* and it is for the service of the Church that there should be companies of men relieved from cares of the world, who may pray to God without ceasing for the state of the Church. But this institution is a near neighbour to that form of hypocrisy which I speak of: nor is the institution itself meant to be condemned; but only those self-exalting spirits to be restrained. For both Enoch, he who walked with God, prophecied, as we know from Jude, and endowed the Church with the fruit of his prophecy; and John the Baptist, whom some would have to be the founder of the life monastic, exercised much ministry both of prophecy and baptism. For it is to those others, who are so officious towards God, that that question is applied: *If thou be righteous what givest thou him, or what receiveth he of thine hand?* The works of mercy therefore are the works whereby to distinguish hypocrites. With heretics on the contrary it is otherwise: for as hypocrites seek by a pretended holiness towards God to cover their injuries towards men; so heretics seek by a certain moral carriage towards men to make a passage for their blasphemies against God.

OF IMPOSTORS.

Whether we be beside ourselves, it is to God; or whether we be sober, it is for your cause.

Here is the true image and true temper of a man who has religion deeply seated in his heart, and is God's faithful workman. His carriage and conversation towards God is full of excess, of zeal, of extasy. Hence groans unspeakable, and exultations, and raptures of spirit, and agonies. His bearing and conversation with men on the contrary is full of mildness and sobriety and appliable demeanour: whence that saying, *I am become all things to all men*, and the like. Contrary it is with hypocrites and impostors: for they in the Church and towards the people set themselves on fire, and are carried as it were out of themselves, and becoming as men inspired with holy furies, they set heaven and earth together. But if a man should look into their times of solitude, and separate meditations, and conversations with God, he would find them not only cold and without life, but full of malice and leaven; *sober towards God; beside themselves to the people.*

OF THE KINDS OF IMPOSTURE.

Avoid profane novelties of terms and oppositions of science falsely so called.
Avoid fond and idle fables.
Let no man deceive you with high speech.

There are three kinds of speech, and as it were styles of imposture. The first kind is of those who, as soon as they get any subject-matter, straightway make an art of it, fit it with technical terms, reduce all into distinctions, thence educe positions and assertions, and frame oppositions by questions and answers. Hence the rubbish and pother of the schoolmen. The second kind is of those who through vanity of wit, as a kind of holy poets, imagine and invent all variety of stories and examples, for the training and moulding of men's minds: whence the lives of the fathers, and innumerable figments of the ancient heretics. The third kind is of those who fill everything with

mysteries and high-sounding phrases, allegories and allusions: which mystic and Gnostic style of discourse a great number of heretics have adopted. Of these kinds, the first catches and entangles man's sense and understanding, the second allures, the third astonishes: all seduce it.

OF ATHEISM.

The fool hath said in his heart, There is no God.

First, *he hath said in his heart;* it is not said, *he hath thought in his heart:* that is, it is not so much that he feels it inwardly, as that he wishes to believe it. Because he sees that it would be good for him that there were no God, he strives by all means to persuade himself of it and induce himself to think so; and sets it up as a theme or position or dogma, which he studies to assert and maintain and establish. Nevertheless there remains in him that sparkle of the original light whereby we acknowledge a divinity, to extinguish which utterly, and pluck the instinct out of his heart, he strives in vain. And therefore it is out of the malice of his will, not out of his natural sense and judgment, that he makes this supposition: as the comic poet says, *Then came my mind over to my opinion;* as though himself and his mind were not one. And so it is true that the Atheist has rather said in his heart than thinks in his heart that there is no God.

Secondly, he hath said it in his heart: he hath not spoken it with his mouth. But note that this is from fear of law and opinion: as one says, *It is a hard matter to deny the Gods in a public assembly, but in a familiar conference it is easy enough.* For if this restraint were removed, there is no heresy which strives with more zeal to spread and sow and multiply itself, than Atheism. Nor shall you see those who are fallen into this phrensy to breathe and importunately inculcate anything else almost, than speech tending to Atheism; as in Lucretius the Epicurean; who makes his invective against religion almost as the burthen or verse of return to every other subject. The reason appears to be that the Atheist, not being well satisfied in his own mind, tossing to and fro, distrustful of himself, and finding many times his opinion faint within him, desires to have it revived by the assent of others. For it is rightly said that *he*

who is very anxious to approve his opinion to another, himself distrusts it.

Thirdly, he is a fool who has said this in his heart; which is most true: a fool, not only as wanting wisdom in divine matters, but humanly also. For first, you will find those wits which are prone to Atheism to be commonly light and scoffing and rash and insolent: of that composition in short which is most opposed to wisdom and gravity. Secondly, among statesmen, the deeper wits and larger hearts have not made pretence of religion to the people, but have in their private and inward opinion paid respect to it, as those who have attributed most to providence and fortune: while those on the contrary who have ascribed everything to their own arts and industries, and to immediate and apparent causes, and *sacrificed* (as the prophet says) *to their own nets*, have been paltry politicians, and mountebanks, and incapable of great actions. Thirdly, in physics likewise I maintain this — that a little natural philosophy and the first entrance into it inclines men's opinions to Atheism; but on the other hand much natural philosophy and a deeper progress into it brings men's minds about again to religion. So that Atheism appears to be convicted on all sides of folly and ignorance: and it is truly the saying of fools, that there is no God.

OF HERESIES.

Ye err, not knowing the Scriptures, nor the power of God.

This canon is the mother of all canons against heresies. The cause of error is twofold: ignorance of the will of God, and ignorance or superficial consideration of the power of God. The will of God is more revealed through the Scriptures: *Search the Scriptures;* his power more through his creatures: *Behold and consider the creatures.* So is the plenitude of God's power to be asserted, as not to involve any imputation upon his will. So is the goodness of his will to be asserted, as not to imply any derogation of his power. True religion therefore is seated in the mean, between Superstition with superstitious heresies on one side, and Atheism with profane heresies on the other. Superstition, rejecting the light of the Scriptures, and giving itself up to corrupt or apocryphal traditions, and new revelations or false interpretations of the Scriptures, invents and dreams many things

concerning the will of God which are astray and alien from the Scriptures. Atheism and Theomachy rebels and mutinies against the power of God; not trusting to his word, which reveals his will, because it does not believe in his power, to whom all things are possible. Now the heresies which spring from this source appear to be more heinous than the rest: for in civil government also it is a more atrocious thing to deny the power and majesty of the prince, than to slander his reputation. But of the heresies which deny the power of God, there are, besides simple atheism, three degrees; and they have all one and the same mystery (for all antichristianism works in a mystery, that is under a shadow of good); namely to discharge the will of God from all imputation of evil. The first degree is of those who set up two equal and contrary principles, at war with one another, one of good the other of ill. The second is of those who think it too injurious to the majesty of God to allow of an active and affirmative principle being set up against him; and therefore reject such boldness; but nevertheless bring in a negative and privative principle in opposition to him. For they suppose it to be the inherent natural and substantive operation of matter itself and the creature, to tend and fall back of itself into confusion and nothingness: not knowing that it is no less the work of omnipotence to make nothing of something, than to make something of nothing. The third degree is of those who limit and restrain the former opinion to human actions only, which partake of sin: which actions they suppose to depend substantively and without any chain of causes upon the inward will and choice of man; and who give a wider range to the knowledge of God than to his power; or rather to that part of God's power (for knowledge itself is power) whereby he knows, than to that whereby he works and acts; suffering him to foreknow some things as an unconcerned looker on, which he does not predestine and preordain: a notion not unlike the figment which Epicurus introduced into the philosophy of Democritus, to get rid of fate and make room for fortune; namely the sidelong motion of the Atom; which has ever by the wiser sort been accounted a very empty device. But the fact is that whatever does not depend upon God as author and principle, by links and subordinate degrees, the same will be instead of God, and a new principle and kind of usurping God. And therefore that opinion is rightly rejected as treason against the majesty and

power of God. And yet for all that it is very truly said that *God is not the author of evil;* not because he is not author,—but because not of evil.

OF THE CHURCH AND THE SCRIPTURES.

Thou shalt protect them in thy tabernacle from the contradiction of tongues.

Contradictions of tongues are found everywhere out of the tabernacle of God: turn which way you will therefore, you will find no end of controversies unless you betake yourself thither. True, you all say — namely to the unity of the Church. But observe. In the tabernacle was the ark, and in the ark was the testimony or tables of the law. Why do you talk to me of the tabernacle, which is the shell; without the testimony, which is the kernel? The tabernacle was ordained for the custody and handing down of the testimony. In like manner to the Church is committed the custody and handing down of the Scriptures: but the soul of the tabernacle is the testimony.

PRAYERS.

PREFACE.

Of the three prayers which follow, the two first come from the *Baconiana*, and would be accepted as genuine compositions of Bacon's on Tenison's authority, even if we did not find Latin versions of them in works published by himself. The third is of more doubtful authenticity; being attributed to Bacon on no better authority (so far as I know) than that of the unknown editor of the *Remains;* who prints it at the end of the volume, immediately after the Confession of Faith. That Dr. Rawley makes no mention of it, is not perhaps to be taken as a proof that he thought it not genuine; because it belongs to a class of compositions which he did not consider proper for publication; and Tenison's silence may mean no more than that he had no evidence that it *was* genuine; for if he had found any copy of it among Bacon's papers, he would probably either have printed it with the other two, or referred to it as already printed. The external evidence therefore cannot be considered conclusive either way; but inclines if anything against it. Nor does the internal evidence help much to settle the question. The language of devotion is a common language and tends to drown the distinctions of personal style. I cannot say that there is any thing in it which strikes me as decidedly unlike Bacon; and my chief reasons for doubting that it is his, is that neither does it contain anything which strikes me as decidedly like him. And with this mark of doubt upon it, it may take its place with the others.

A fourth prayer of Bacon's there is, of the authenticity of which I have no doubt. But as its peculiar significance depends upon the occasion on which it was composed, I reserve it for its place among the Occasional Works.

PRAYERS.

TWO PRAYERS

COMPOSED BY SIR FRANCIS BACON, BARON OF VERULAM AND VISCOUNT ST. ALBAN.[1]

The first Prayer, called by his Lordship

THE STUDENT'S PRAYER.

To God the Father, God the Word, God the Spirit, we pour forth most humble and hearty supplications; that He, remembering the calamities of mankind and the pilgrimage of this our life, in which we wear out days few and evil, would please to open to us new refreshments out of the fountains of his goodness, for the alleviating of our miseries. This also we humbly and earnestly beg, that Human things may not prejudice such as are Divine; neither that from the unlocking of the gates of sense, and the kindling of a greater natural light, anything of incredulity or intellectual night may arise in our minds towards the Divine Mysteries. But rather that by our mind throughly cleansed and purged from fancy and vanities, and yet subject and perfectly given up to the Divine Oracles, there may be given unto Faith the things that are Faith's. Amen.

The second Prayer, called by his Lordship

THE WRITER'S PRAYER.

Thou, O Father! who gavest the Visible Light as the first-born of thy Creatures, and didst pour into man the Intellectual Light as the top and consummation of thy workmanship, be pleased to protect and govern this work, which coming from thy Good-

[1] Baconiana, p. 181.

ness returneth to thy Glory. Thou, after thou hadst reviewed the works which thy hands had made, beheldest that *everything was very good;* and thou didst rest with complacency in them. But Man reflecting on the works which he had made, saw that *all was vanity and vexation of Spirit,* and could by no means acquiesce in them. Wherefore if we labour in thy works with the sweat of our brows, thou wilt make us partakers of thy Vision and thy Sabbath. We humbly beg that this mind may be steadfastly in us, and that thou, by our hands and also by the hands of others on whom thou shalt bestow the same spirit, wilt please to convey a largeness of new alms to thy family of Mankind. These things we commend to thy everlasting love, by our Jesus, thy Christ, God with us. Amen.

A PRAYER

Made and used by the late Lord Chancellor.[1]

O ETERNAL God, and most merciful Father in Jesus Christ in whom thou hast made.[2] Let the words of our mouths, and the meditations of our hearts be now and ever gracious in thy sight, and acceptable unto thee, O Lord, our God, our strength, and our Redeemer.

O Eternal God, and most merciful Father in Jesus Christ, in whom thou hast made a covenant of grace and mercy with all those that come unto thee in him; in his name and mediation we humbly prostrate ourselves before the throne of thy mercies' seat, acknowledging that by the breach of all thy holy laws and commandments, we are become wild olive branches, strangers to thy covenant of grace; we have defaced in ourselves thy sacred image imprinted in us by creation; we have sinned against heaven and before thee, and are no more worthy to be called thy children. O admit us into the place even of hired servants. Lord, thou hast formed us in our mothers' wombs, thy providence hath hitherto watched over us, and preserved us unto this period of time: O stay not the course of thy mercies and loving-kindness towards us: have mercy upon us, O Lord, for thy dear Son Christ Jesus sake, who is the way, the truth, and the life. In him, O Lord, we appeal from thy justice to

[1] Remains, p. 101.

[2] So in the original. There has been some confusion between the first and second paragraphs; but one cannot well tell where it begins.

thy mercy, beseeching thee in his name, and for his sake only, thou wilt be graciously pleased freely to pardon and forgive us all our sins and disobedience, whether in thought, word, or deed, committed against thy divine Majesty; and in his precious blood-shedding, death, and perfect obedience, free us from the guilt, the stain, the punishment, and dominion of all our sins, and clothe us with his perfect righteousness. There is mercy with thee, O Lord, that thou mayest be feared; yea, thy mercies swallow up the greatness of our sins: speak peace to our souls and consciences; make us happy in the free remission of all our sins, and be reconciled to thy poor servants in Jesus Christ, in whom thou art well pleased: suffer not the works of thine own hands to perish; thou art not delighted in the death of sinners, but in their conversion. Turn our hearts, and we shall be turned; convert us, and we shall be converted; illuminate the eyes of our minds and understanding with the bright beams of thy Holy Spirit, that we may daily grow in the saving knowledge of the heavenly mystery of our redemption, wrought by our dear Lord and Saviour Jesus Christ; sanctify our wills and affection by the same Spirit, the most sacred fountain of all grace and goodness; reduce them to the obedience of thy most holy will in the practice of all piety toward thee, and charity towards all men. Inflame our hearts with thy love, cast forth of them what displeaseth thee, all infidelity, hardness of heart, profaneness, hypocrisy, contempt of thy holy word and ordinances, all uncleanness, and whatsoever advanceth itself in opposition to thy holy will. And grant that henceforth, through thy grace, we may be enabled to lead a godly, holy, sober, and Christian life, in true sincerity and uprightness of heart before thee. To this end, plant thy holy fear in our hearts, grant that it may never depart from before our eyes, but continually guide our feet in the paths of thy righteousness, and in the ways of thy commandments: increase our weak faith, grant it may daily bring forth the true fruits of unfeigned repentance, that by the power of the death of our Lord and Saviour Jesus Christ we may daily die unto sin, and by the power of his resurrection we may be quickened, and raised up to newness of life, may truly be born anew, and may be effectually made partakers of the first resurrection, that then the second death may never have dominion over us. Teach us, O Lord, so to number our days, that we may apply our hearts

unto wisdom; make us ever mindful of our last end, and continually to exercise the knowledge of grace in our hearts, that in the said divorce of soul and body, we may be translated here to that kingdom of glory prepared for all those that love thee, and shall trust in thee; even then and ever, O Lord, let thy holy angels pitch their tents round about us, to guard and defend us from all the malice of Satan, and from all perils both of soul and body. Pardon all our unthankfulness, make us daily more and more thankful for all thy mercies and benefits daily poured down upon us. Let these our humble prayers ascend to the throne of grace, and be granted not only for these mercies, but for whatsoever else thy wisdom knows needful for us; and for all those that are in need, misery, and distress, whom, Lord, thou hast afflicted either in soul or body, grant them patience and perseverance in the end, and to the end: And that, O Lord, not for any merits of ours, but only for the merits[1] of thy Son, and our alone Saviour Christ Jesus; to whom with thee and the Holy Spirit be ascribed all glory, &c. *Amen.*

[1] The original has "not for any merits of thy son:" the omitted words have been supplied by an obvious conjecture; but I do not know by whom.

TRANSLATION OF CERTAIN PSALMS.

PREFACE.

THE *translation of certain Psalms into English verse* (the only verses certainly of Bacon's making that have come down to us, and probably with one or two slight exceptions the only verses he ever attempted,) was made, as the collection of Apophthegms also was, during a fit of sickness in 1624. Had it been merely composed, fairly copied, and presented with a grateful and graceful dedication to his friend George Herbert, there would have been nothing in the matter to call for explanation. A full mind, accustomed to work under the excitement of an eager temperament and the consciousness of great purposes unaccomplished and the time fast approaching when no man can work, cannot find rest in inaction; but only in some other mode of activity, which may occupy without exciting or too deeply engaging it. For this purpose no exercises can be better than the turning over and reviewing of the miscellaneous stores of the memory, and the mechanical process of arranging words in metre.

> But for the unquiet heart and brain
> A use in measured language lies:
> The sad mechanic exercise,
> Like dull narcotics, numbing pain.

Bacon however not only composed these two little works, but published them[1]: a fact which, considering how little he had cared to publish during the first sixty years of his life, and how many things of weightier character and more careful workmanship he had then by him in his cabinet, (including the entire contents of the *Miscellany works* and the *Resuscitatio*,) is somewhat remarkable. My own conjecture is, that things of more serious import he did not like to publish in an imperfect shape as long as he could hope to perfect them, but that he owed money to his

[1] In December 1624. See Court and Times of James I., ii. p. 486.

printer and bookseller, and if such trifles as these would help to pay it, he had no objection to their being used for the purpose.

In compositions upon which a man would have thought it a culpable waste of time to bestow any serious labour, it would be idle to seek either for indications of his taste or for a measure of his powers. And yet as Bacon could not have gone on turning so many of the Psalms into verse without thinking a good deal about the way in which it should be done, there is some interest in watching his progress. At first he seems to have tried to keep close to the text: adding no more than the necessities of metre required. His two first experiments appear to be done on this principle, and the effect is flat enough. I fancy too that he felt it to be so. For as he advances he falls more and more into a kind of paraphrase; in which the inevitable loss of lyric fire and force is in some degree compensated by the development of meanings which are implied or suggested by the original, but not so as to strike the imagination of a modern reader; so that the translation serves for a kind of poetical commentary; and, though far from representing the effect of the original in itself, holds up a light to read it by. For myself at least I may say that, deeply pathetic as the opening of the 137th psalm always seemed to me, I have found it much more affecting since I read Bacon's paraphrase of it.

"By the waters of Babylon we sat down, and wept when we remembered Sion. As for our harps, we hanged them up upon the trees that are therein. For they that led us away captive required of us then a song, and melody in our heaviness," &c.

When as we sate, all sad and desolate,
By Babylon upon the river's side,
Eased from the tasks which in our captive state
We were enforced daily to abide,
Our harps we had brought with us to the field,
Some solace to our heavy souls to yield.

But soon we found we fail'd of our account:
For *when our minds some freedom did obtain,*
Straightways the memory of Sion Mount
Did cause afresh our wounds to bleed again;
So that with present griefs and future fears
Our eyes burst forth into a stream of tears.

As for our harps, *since sorrow struck them dumb,*
We hang'd them on the willow trees were near, &c.

To those who heard the psalm sung, a word was enough to bring the whole scene with all its pathetic circumstances to the mind;—the short respite from servile toil, the recurrence of the thoughts to Sion, and the overpowering recollections awakened by the melody. But to us they are not obvious enough to make description superfluous; and I doubt whether there are many readers who fully realise the situation. All poetry, but more especially lyrical poetry, requires many things to be translated besides the words, before it can bear flower and fruit in another language and another age. And it is possible that if an attempt were made to translate the Psalms of David on this principle, it might not end (as almost all attempts have ended hitherto) in the degradation of them out of very rich prose into very poor verse.

Of these verses of Bacon's it has been usual to speak not only as a failure, but as a ridiculous failure: a censure in which I cannot concur. An unpractised versifier, who will not take time and trouble about the work, must of course leave many bad verses: for poetic feeling and imagination, though they will dislike a wrong word, will not of themselves suggest a right one that will suit metre and rhyme: and it would be easy to quote from the few pages that follow, not only many bad lines, but many poor stanzas. But in a work that is executed carelessly or hastily, we must look at the best parts, and not at the worst, for signs of what a man can do. And taking this test, I should myself infer from this sample that Bacon had all the natural faculties which a poet wants: a fine ear for metre, a fine feeling for imaginative effect in words, and a vein of poetic passion.

> Thou carriest man away as with a tide;
> *Then down swim all his thoughts that mounted high;*
> Much like a mocking dream, that will not bide,
> But flies before the sight of waking eye;
> Or as the grass, that cannot term obtain
> *To see the Summer come about again.*

The thought in the second line could not well be fitted with imagery words and rhythm more apt and imaginative; and there is a tenderness of expression in the concluding couplet which comes manifestly out of a heart in sensitive sympathy with nature, and fully capable of the poet's faith

> that every flower
> Enjoys the air it breathes.

Take again, as a sample of versification, the opening of the hundred and fourth psalm:

> Father and King of Powers, both high and low,
> Whose sounding fame all creatures serve to blow;
> My voice shall with the rest strike up thy praise
> And carol of thy works and wondrous ways.
> But who can blaze thy beauties, Lord, aright?
> They turn the brittle beams of mortal sight.
> Upon thy head thou wear'st a glorious crown,
> All set with virtues, polish'd with renown;
> Thence round about a silver veil doth fall
> Of crystal light, mother of colours all; &c.

The heroic couplet could hardly do its work better in the hands of Dryden.

The truth is that Bacon was not without the "fine phrensy" of the poet; but the world into which it transported him was one which, while it promised visions more glorious than any poet could imagine, promised them upon the express condition that fiction should be utterly prohibited and excluded. Had it taken the ordinary direction, I have little doubt that it would have carried him to a place among the great poets; but it was the study of his life to refrain his imagination and keep it within the modesty of truth; aspiring no higher than to be a faithful interpreter of nature, waiting for the day when the "Kingdom of Man" should come.

Besides these translations, Bacon once wrote a sonnet: but we know no more about it than that it was meant in some way or other to assist in sweetening the Queen's temper towards the Earl of Essex: and it has either not been preserved at all, or not so as to be identified. There are also two other poems which have been ascribed to him, whether upon the authority of any one who had means of knowing, I cannot say; but certainly upon external evidence which, in the absence of internal evidence to the contrary, entitles them to a place somewhere in this edition: and there can be no place fitter than this.

The first is to be found in a volume of manuscript collections now in the British Museum (Bibl. Regia, 17. B. L.); but the hand is that of a copyist, and tells us only that *somebody* had said

[1] *Indicia vera de Interpretatione Naturæ, sive de* Regno Hominis. Title of the *Novum Organum*.

or thought that the verses were by Bacon: — a fact however which is worth rather more in this case than in many others; inasmuch as (verses being out of Bacon's line) a man merely guessing at the author is not likely to have thought of him. The internal evidence tells for little either way. They are such lines as might very well have been written by Bacon, or by a hundred other people.

VERSES MADE BY MR. FRANCIS BACON.

The man of life upright, whose guiltless heart is free
From all dishonest deeds and thoughts of vanity:
The man whose silent days in harmless joys are spent,
Whom hopes cannot delude, nor fortune discontent;
That man needs neither towers nor armour for defence,
Nor secret vaults to fly from thunder's violence:
He only can behold with unaffrighted eyes
The horrors of the deep and terrors of the skies;
Thus scorning all the care that Fate or Fortune brings,
He makes the Heaven his book, his wisdom heavenly things
Good thoughts his only friends, his life a well-spent age,
The earth his sober inn, — a quiet pilgrimage.

The other is a more remarkable performance; and is ascribed to Bacon on the authority of Thomas Farnaby, a contemporary and a scholar. It is a paraphrase of a Greek epigram, attributed by some to Poseidippus, by others to Plato the Comic poet, and by others to Crates the Cynic. In 1629, only three years after Bacon's death, Farnaby published a collection of Greek Epigrams under the title Ἡ *τῆς ἀνθολογίας* Ἀνθολογία: *Florilegium Epigrammatum Græcorum, eorumque Latino versu a variis redditorum.* After giving the epigram in question, with its Latin translation on the opposite page, he adds — *Huc elegantem V. C. L. Domini Verulamii παρῳδίαν adjicere adlubuit;* and then prints the English lines below (the only English in the book); with a translation of his own opposite, in rhyming Greek. A copy of the English lines was also found among Sir Henry Wotton's papers, with the name *Francis Lord Bacon* at the bottom[1]; — a fact which would be of weight, if one could

[1] See Reliquiæ Wottonianæ, p. 513.

infer from it that Wotton believed them to be genuine; for he was a man likely enough to know. This however would be too much to infer from the mere circumstance that the paper had been in Wotton's possession, for it may have been sent to him by a correspondent, he knowing nothing about it: and as the case stands, he is not sufficiently connected with it to be cited as a witness. But on the other hand Farnaby's evidence is direct and strong. He speaks as if there were no doubt about the fact; nor has there ever, I believe, been a rival claim put in for any body else. So that unless the supposition involves some improbability (and I do not myself see any), the natural conclusion is that the lines were really written by Bacon. And when I compare them with his translations of the 90th and 137th psalms, the metre of which, though not the same, has a kind of resemblance which makes the comparison more easy,—especially in the rhymed couplet which closes each stanza, — I should myself say that the internal evidence is in favour of their being by the same hand.

The original (the text of which I take from Wellesley's *Anthologia Polyglotta*) runs thus:

ΠΟΣΕΙΔΙΠΠΟΥ, *οἱ δὲ* ΠΛΑΤΩΝΟΣ ΚΩΜΙΚΟΥ.

Ποίην τις βιότοιο τάμοι τρίβον; εἰν ἀγορῇ μὲν
Νείκεα καὶ χαλεπαὶ πρήξιες· ἐν δὲ δόμοις
Φροντίδες· ἐν δ' ἀγροῖς καμάτων ἅλις· ἐν δὲ θαλάσσῃ
Τάρβος· ἐπὶ ξείνης δ', ἣν μὲν ἔχῃς τι, δέος·
Ἢν δ' ἀπορῇς, ἀνιηρόν. ἔχεις γάμον; οὐκ ἀμέριμνος
Ἔσσεαι· οὐ γαμέεις; ζῇς ἐπ' ἐρημότερος.
Τέκνα πόνοι· πήρωσις ἅπαις βίος· αἱ νεότητες
Ἄφρονες· αἱ πολιαὶ δ' ἔμπαλιν ἀδρανέες.
Ἢν ἄρα τοῖνδε δυοῖν ἐνὸς αἵρεσις, ἢ τὸ γενέσθαι
Μηδέποτ', ἢ τὸ θανεῖν αὐτίκα τικτόμενον.

The English lines which follow (described as "Lord Verulam's elegant *παρῳδία*") are not meant for a translation, and can hardly be called a paraphrase. They are rather another poem on the same subject and with the same sentiment; and though the topics are mostly the same, the treatment of them is very different. The merit of the original consists almost entirely in its compactness; there being no special felicity in the expres-

sion, or music in the metre.[1] In the English, compactness is not aimed at, and a tone of plaintive melody is imparted, which is due chiefly to the metrical arrangement, and has something very pathetic in it to my ear.

The world's a bubble, and the life of man
less than a span;
In his conception wretched, from the womb
so to the tomb:
Curst from the cradle, and brought up to years
with cares and fears.
Who then to frail mortality shall trust,
But limns the water, or but writes in dust.

Yet since with sorrow here we live oppress,
what life is best?
Courts are but only superficial schools
to dandle fools.
The rural parts are turned into a den
of savage men.
And where's the city from all vice so free,
But may be term'd the worst of all the three?

Domestic cares afflict the husband's bed,
or pains his head.
Those that live single take it for a curse,
or do things worse.
Some would have children; those that have them moan,
or wish them gone.
What is it then to have or have no wife,
But single thraldom, or a double strife?

[1] So little does the effect depend upon the metre, that a fair enough idea may be conveyed of it in English blank verse, which can follow the words more closely than rhyme.

What life shall a man choose? In court and mart
Are quarrels and hard dealing; cares at home;
Labours by land; terrors at sea; abroad,
Either the fear of losing what thou hast,
Or worse, nought left to lose; if wedded, much
Discomfort; comfortless unwed: a life
With children troubled, incomplete without:
Youth foolish, age outworn. Of these two choose then;
Or never to be born, or straight to die.

Our own affections still at home to please
is a disease:
To cross the seas to any foreign soil
perils and toil.
Wars with their noise affright us: when they cease,
we are worse in peace.
What then remains, but that we still should cry
Not to be born, or being born to die.

TRANSLATION

OF

CERTAINE PSALMES

INTO

ENGLISH VERSE.

BY

THE RIGHT HONOURABLE

FRANCIS LO. VERULAM, VISCOUNT ST. ALBAN.

LONDON:

Printed for Hanna Barret, and Richard Whittaker; and are to be sold at the signe of the King's Head in Paul's Church Yard.

1625.

TO HIS VERY GOOD FRIEND

MR. GEORGE HERBERT.

THE pains that it pleased you to take about some of my writings I cannot forget; which did put me in mind to dedicate to you this poor exercise of my sickness. Besides, it being my manner for dedications, to choose those that I hold most fit for the argument, I thought that in respect of divinity and poesy met, (whereof the one is the matter, the other the stile of this little writing,) I could not make better choice. So, with signification of my love and acknowledgment, I ever rest

Your affectionate Friend,

FR. ST. ALBAN.

A

TRANSLATION OF CERTAIN PSALMS.

THE TRANSLATION OF THE 1ST PSALM.

WHO never gave to wicked reed
A yielding and attentive ear;
Who never sinner's paths did tread,
Nor sat him down in scorner's chair;
But maketh it his whole delight
On law of God to meditate,
And therein spendeth day and night:
That man is in a happy state.

He shall be like the fruitful tree,
Planted along a running spring,
Which, in due season, constantly
A goodly yield of fruit doth bring:
Whose leaves continue always green,
And are no prey to winter's pow'r:
So shall that man not once be seen
Surprised with an evil hour.

With wicked men it is not so,
Their lot is of another kind:
All as the chaff, which to and fro
Is toss'd at mercy of the wind.
And when he shall in judgment plead,
A casting sentence bide he must:
So shall he not lift up his head
In the assembly of the just.

For why? the Lord hath special eye
To be the godly's stay at call:
And hath given over, righteously,
The wicked man to take his fall.

THE TRANSLATION OF THE XIIth PSALM.

Help, Lord, for godly men have took their flight,
And left the earth to be the wicked's den:
Not one that standeth fast to truth and right,
But fears, or seeks to please, the eyes of men.
When one with other falls in talk apart,
Their meaning go'th not with their words, in proof;
But fair they flatter, with a cloven heart,
By pleasing words, to work their own behoof.

But God cut off the lips, that are all set
To trap the harmless soul, that peace hath vow'd;
And pierce the tongues, that seek to counterfeit
The confidence of truth, by lying loud:
Yet so they think to reign, and work their will
By subtile speech, which enters ev'ry where;
And say, Our tongues are ours, to help us still;
What need we any higher pow'r to fear?

Now for the bitter sighing of the poor,
The Lord hath said, I will no more forbear
The wicked's kingdom to invade and scour,
And set at large the men restrain'd in fear.
And sure the word of God is pure and fine,
And in the trial never loseth weight;
Like noble gold, which, since it left the mine,
Hath seven times passed through the fiery strait.

And now thou wilt not first thy word forsake,
Nor yet the righteous man that leans thereto;
But wilt his safe protection undertake,
In spite of all their force and wiles can do.

And time it is, O Lord, thou didst draw nigh;
The wicked daily do enlarge their bands;
And that which makes them follow ill a vie,
Rule is betaken to unworthy hands.

THE TRANSLATION OF THE XCTH PSALM.

O LORD, thou art our home, to whom we fly,
And so hast always been from age to age:
Before the hills did intercept the eye,
Or that the frame was up of earthly stage,
One God thou wert, and art, and still shall be;
The line of Time, it doth not measure thee.

Both death and life obey thy holy lore,
And visit in their turns, as they are sent;
A thousand years with thee they are no more
Than yesterday, which, ere it is, is spent:
Or as a watch by night, that course doth keep,
And goes, and comes, unwares to them that sleep.

Thou carriest man away as with a tide:
Then down swim all his thoughts that mounted high:
Much like a mocking dream, that will not bide,
But flies before the sight of waking eye;
Or as the grass, that cannot term obtain
To see the summer come about again.

At morning, fair it musters on the ground;
At even, it is cut down and laid along:
And though it spared were and favour found,
The weather would perform the mower's wrong:
Thus hast thou hang'd our life on brittle pins,
To let us know it will not bear our sins.

Thou buriest not within oblivion's tomb
Our trespasses, but ent'rest them aright;
Ev'n those that are conceiv'd in darkness' womb,
To thee appear as done at broad day-light.
As a tale told, which sometimes men attend,
And sometimes not, our life steals to an end.

The life of man is threescore years and ten,
Or, that if he be strong, perhaps fourscore;
Yet all things are but labour to him then,
New sorrows still come on, pleasures no more.
Why should there be such turmoil and such strife,
To spin in length this feeble line of life?

But who considers duly of thine ire?
Or doth the thoughts thereof wisely embrace?
For thou, O God, art a consuming fire:
Frail man, how can he stand before thy face?
If thy displeasure thou dost not refrain,
A moment brings all back to dust again.

Teach us, O Lord, to number well our days,
Thereby our hearts to wisdom to apply;
For that which guides man best in all his ways,
Is meditation of mortality.
This bubble light, this vapour of our breath,
Teach us to consecrate to hour of death.

Return unto us, Lord, and balance now
With days of joy our days of misery;
Help us right soon, our knees to thee we bow,
Depending wholly on thy clemency;
Then shall thy servants both with heart and voice,
All the days of their life in thee rejoice.

Begin thy work, O Lord, in this our age,
Shew it unto thy servants that now live;
But to our children raise it many a stage,
That all the world to thee may glory give.
Our handy-work likewise, as fruitful tree,
Let it, O Lord, blessed, not blasted be.

THE TRANSLATION OF THE CIVTH PSALM.

FATHER and King of pow'rs, both high and low,
Whose sounding fame all creatures serve to blow;
My soul shall with the rest strike up thy praise,
And carol of thy works and wondrous ways.
But who can blaze thy beauties, Lord, aright?
They turn the brittle beams of mortal sight.
Upon thy head thou wear'st a glorious crown,
All set with virtues, polish'd with renown:
Thence round about a silver veil doth fall
Of crystal light, mother of colours all.
The compass heaven, smooth without grain or fold,
All set with spangs of glitt'ring stars untold,
And strip'd with golden beams of power unpent,
Is raised up for a removing tent.
Vaulted and arched are his chamber beams
Upon the seas, the waters, and the streams:
The clouds as chariots swift do scour the sky;
The stormy winds upon their wings do fly.
His angels spirits are, that wait his will,
As flames of fire his anger they fulfil.
In the beginning, with a mighty hand,
He made the earth by counterpoise to stand;
Never to move, but to be fixed still;
Yet hath no pillars but his sacred will.
This earth, as with a veil, once cover'd was,
The waters over-flowed all the mass:
But upon his rebuke away they fled,
And then the hills began to shew their head;
The vales their hollow bosoms open'd plain,
The streams ran trembling down the vales again:
And that the earth no more might drowned be,
He set the sea his bounds of liberty;
And though his waves resound, and beat the shore,
Yet it is bridled by his holy lore.
Then did the rivers seek their proper places,
And found their heads, their issues, and their races;

The springs do feed the rivers all the way,
And so the tribute to the sea repay:
Running along through many a pleasant field,
Much fruitfulness unto the earth they yield:
That know the beasts and cattle feeding by,
Which for to slake their thirst do thither hie.
Nay desert grounds the streams do not forsake,
But through the unknown ways their journey take:
The asses wild, that hide in wilderness,
Do thither come, their thirst for to refresh.
The shady trees along their banks do spring,
In which the birds do build, and sit, and sing;
Stroking the gentle air with pleasant notes,
Plaining or chirping through their warbling throats.
The higher grounds, where waters cannot rise,
By rain and dews are water'd from the skies;
Causing the earth put forth the grass for beasts,
And garden herbs, serv'd at the greatest feasts;
And bread, that is all viands' firmament,
And gives a firm and solid nourishment;
And wine, man's spirits for to recreate;
And oil, his face for to exhilarate.
The sappy cedars, tall like stately tow'rs,
High-flying birds do harbour in their bow'rs:
The holy storks, that are the travellers,
Choose for to dwell and build within the firs;
The climbing goats hang on steep mountain's side;
The digging conies in the rocks do bide.
The moon, so constant in inconstancy,
Doth rule the monthly seasons orderly;
The sun, eye of the world, doth know his race,
And when to shew, and when to hide his face.
Thou makest darkness, that it may be night,
When as the savage beasts, that fly the light,
(As conscious of man's hatred) leave their den,
And range abroad, secur'd from sight of men.
Then do the forests ring of lions roaring,
That ask their meat of God, their strength restoring;
But when the day appears, they back do fly,
And in their dens again do lurking lie.

Then man goes forth to labour in the field,
Whereby his grounds more rich increase may yield.
O Lord, thy providence sufficeth all;
Thy goodness, not restrained, but general
Over thy creatures: the whole earth doth flow
With thy great largeness pour'd forth here below.
Nor is it earth alone exalts thy name,
But seas and streams likewise do spread the same.
The rolling seas unto the lot doth fall
Of beasts innumerable, great and small;
There do the stately ships plough up the floods,
The greater navies look like walking woods;
The fishes there far voyages do make,
To divers shores their journey they do take.
There hast thou set the great Leviathan,
That makes the seas to seeth like boiling pan.
All these do ask of thee their meat to live,
Which in due season thou to them dost give.
Ope thou thy hand, and then they have good fare;
Shut thou thy hand, and then they troubled are.
All life and spirit from thy breath proceed,
Thy word doth all things generate and feed.
If thou withdraw'st it, then they cease to be,
And straight return to dust and vanity;
But when thy breath thou dost send forth again,
Then all things do renew and spring amain;
So that the earth, but lately desolate,
Doth now return unto the former state.
The glorious majesty of God above
Shall ever reign in mercy and in love:
God shall rejoice all his fair works to see,
For as they come from him all perfect be.
The earth shall quake, if aught his wrath provoke;
Let him but touch the mountains, they shall smoke.
As long as life doth last I hymns will sing,
With cheerful voice, to the eternal King;
As long as I have being, I will praise
The works of God, and all his wondrous ways.
I know that he my words will not despise,
Thanksgiving is to him a sacrifice.

But as for sinners, they shall be destroy'd
From off the earth; their places shall be void.
Let all his works praise him with one accord;
O praise the Lord, my soul; praise ye the Lord!

THE TRANSLATION OF THE CXXVIth PSALM.

When God return'd us graciously
Unto our native land,
We seem'd as in a dream to be,
And in a maze to stand.

The heathen likewise they could say:
The God, that these men serve,
Hath done great things for them this day,
Their nation to preserve.

'Tis true, God hath pour'd out his grace
On us abundantly;
For which we yield him psalms and praise,
And thanks with jubilee.

O Lord, turn our captivity,
As winds, that blow at south,
Do pour the tides with violence
Back to the river's mouth.

Who sows in tears shall reap in joy,
The Lord doth so ordain;
So that his seed be pure and good,
His harvest shall be gain.

THE TRANSLATION OF THE CXXXVIIth PSALM.

When as we sat all sad and desolate,
By Babylon upon the river's side,
Eas'd from the tasks which in our captive state
We were enforced daily to abide,
Our harps we had brought with us to the field,
Some solace to our heavy souls to yield.

But soon we found we fail'd of our account,
For when our minds some freedom did obtain,
Straightways the memory of Sion Mount
Did cause afresh our wounds to bleed again;
So that with present griefs, and future fears,
Our eyes burst forth into a stream of tears.

As for our harps, since sorrow struck them dumb,
We hang'd them on the willow-trees were near;
Yet did our cruel masters to us come,
Asking of us some Hebrew songs to hear:
Taunting us rather in our misery,
Than much delighting in our melody.

Alas (said we) who can once force or frame
His grieved and oppressed heart to sing
The praises of Jehovah's glorious name,
In banishment, under a foreign king?
In Sion is his seat and dwelling place,
Thence doth he shew the brightness of his face.

Hierusalem, where God his throne hath set,
Shall any hour absent thee from my mind?
Then let my right hand quite her skill forget,
Then let my voice and words no passage find;
Nay, if I do not thee prefer in all,
That in the compass of my thoughts can fall.

Remember thou, O Lord, the cruel cry
Of Edom's children, which did ring and sound,
Inciting the Chaldean's cruelty,
"Down with it, down with it, even unto the ground."
In that good day repay it unto them,
When thou shalt visit thy Hierusalem.

And thou, O Babylon, shalt have thy turn
By just revenge, and happy shall he be,
That thy proud walls and tow'rs shall waste and burn,
And as thou didst by us, so do by thee.
Yea, happy he, that takes thy children's bones,
And dasheth them against the pavement stones.

THE TRANSLATION OF THE CXLIXTH PSALM.

O SING a new song to our God above;
Avoid profane ones, 'tis for holy quire:
Let Israel sing songs of holy love
To him that made them, with their hearts on fire:
Let Sion's sons lift up their voice, and sing
Carols and anthems to their heavenly King.

Let not your voice alone his praise forth tell,
But move withal and praise him in the dance;
Cymbals and harps let them be tuned well:
'Tis he that doth the poor's estate advance:
Do this not only on the solemn days,
But on your secret beds your spirits raise.

O let the saints bear in their mouth his praise;
And a two-edged sword drawn in their hand;
Therewith for to revenge the former days
Upon all nations that their zeal withstand;
To bind their kings in chains of iron strong,
And manacle their nobles for their wrong.

Expect the time, for 'tis decreed in Heaven,
Such honour shall unto his saints be given.

FINIS.

APPENDIX.

CHRISTIAN PARADOXES.

PREFACE.

THE Character of a believing Christian in paradoxes and seeming contradictions is said to have appeared first in 1643, as a separate pamphlet, under Bacon's name[1]; and in 1648 it was inserted in the *Remains;* upon the authority no doubt of that pamphlet; which is therefore the sole authority on which it is ascribed to Bacon, and amounts in effect to no more than this— that within seven years after his death *somebody* had either thought it was his, or thought that it might be plausibly attributed to him, and that his name on the titlepage would help the sale.

Rawley says nothing of it: and as he can hardly be supposed to have overlooked it in the collection, his silence must be understood as equivalent to a statement that it was one of the many "pamphlets put forth under his lordship's name," which "are not to be owned for his."[2] Tenison says nothing about it. No traces of it, or of any part of it, or of anything at all resembling it, are to be found among the innumerable Baconian manuscripts, fair and foul, — fragments, rough notes, discarded beginnings, loose leaves,— which may still be seen at Lambeth, in the British Museum, and in other repositories. So far as I know, if the publisher of the edition of 1643 had not put Bacon's name upon the titlepage, there would have been no reason at all for thinking that he had anything to do with it; and as it is, the reason is so slight, that if the probabilities were otherwise balanced, it would hardly turn the scale. The name on the titlepage of such a publication is enough to suggest and justify the inquiry *whether* there be any evidence, internal or external, to confirm

[1] Rémusat, p. 150. note.

[2] Resuscitatio, at the end.

the statement; but can scarcely be taken for evidence in itself, even in the absence of evidence the other way.

In the opinions and sentiments which the work implies, there is nothing from which I should infer either that it was not Bacon's or that it was. It is the work of an orthodox Churchman of the early part of the 17th century, who fully and unreservedly accepting on the authority of revelation the entire scheme of Christian theology, and believing that the province of faith is altogether distinct from that of reason, found a pleasure in bringing his spiritual loyalty into stronger relief by confronting and numbering up the intellectual paradoxes which it involved. In these days of uncertain faith it has indeed been mistaken for sarcastic, but I can have no doubt whatever that it was written (whoever wrote it) in the true spirit of the *Credo quia impossibile*, and not only in perfect sincerity, but also in profound security of conviction. One might as well suppose that the Athanasian Creed was written in derision of the particular doctrine of the Trinity, as that this was written in derision of the doctrines of the Christian Church in general.

As far as the opinions are concerned therefore, it might well enough have been written by Bacon: for we know that he did earnestly believe and continually insist upon the necessity of keeping the domains of Reason and Faith distinct. "As it was aptly said by one of Plato's school *the sense of man resembles the sun, which openeth and revealeth the terrestrial globe, but obscureth and concealeth the celestial;* so doth the sense discover natural things, but darken and shut up divine. . . . Therefore attend his will as himself openeth it, and give unto faith that which unto faith belongeth; for *more worthy is it to believe than to think or know*, considering that in knowledge (as we now are capable of it) the mind suffereth from inferior natures; *but in all belief it suffereth from a spirit which it holdeth superior and more authorised than itself.*[1] A dozen passages might be quoted of the same tenor. Upon which principle, to enumerate the points in which the instinct of belief, resting on that higher authority, overrules the instincts of the understanding, is to celebrate the triumph of the worthiest part of man's nature. And this, I have no doubt, is what the writer of these "Christian Paradoxes" thought he was doing.

[1] Valerius Terminus, Vol. III. p. 218.

Turning however from the subject and substance to the *style*, the evidence appears to me to be decidedly against the supposition that Bacon was the writer. It is impossible indeed to say that, among the thousand moods and humours which such a mind must have passed through, the whim of trying such a piece of intellectual ingenuity as this could never on any occasion have seized it. But I think I may say that in the whole compass of his writings,—early and late, serious and playful, argumentative, rhetorical, devotional, official, familiar, public and private,—there is not one to be found which at all resembles it. As this however is a point which hardly admits of proof or disproof, I must be content with stating my own opinion that the composition has none of the marks of Bacon's manner, but a manner of its own essentially unlike his; and producing in evidence the thing itself. And with this I conclude the collection of Literary Works.

THE

CHARACTERS OF A BELIEVING CHRISTIAN,

IN PARADOXES AND SEEMING CONTRADICTIONS.[1]

I.

A CHRISTIAN is one that believes things his reason cannot comprehend; he hopes for things which neither he nor any man alive ever saw: he labours for that which he knoweth he shall never obtain; yet, in the issue, his belief appears not to be false; his hope makes him not ashamed; his labour is not in vain.

II.

He believes three to be one, and one to be three; a father not to be elder than his son; a son to be equal with his father; and one proceeding from both to be equal with both; he believes three persons in one nature, and two natures in one person.

III.

He believes a virgin to be a mother of a son; and that very son of her's to be her maker. He believes him to have been shut up in a narrow room, whom heaven and earth could not contain. He believes him to have been born in time, who was and is from everlasting. He believes him to have been a weak child, carried in arms, who is the Almighty; and him once to have died, who only hath life and immortality in himself.

IV.

He believes the God of all grace to have been angry with one that hath never offended him; and that God, that hates sin, to be reconciled to himself, though sinning continually, and never making, or being able to make him satisfaction. He believes a most just God to have punished a most just person, and to have

[1] Remains, p. 88. Several corrections have been introduced into the text by one of the modern editors, apparently from some better copy; which I have therefore adopted.

justified himself though a most ungodly sinner. He believes himself freely pardoned, and yet a sufficient satisfaction was made for him.

V.

He believes himself to be precious in God's sight, and yet loathes himself in his own. He dares not justify himself even in those things wherein he can find no fault with himself, and yet believes God accepts him in those services wherein he is able to find many faults.

VI.

He praises God for his justice, and yet fears him for his mercy. He is so ashamed as that he dares not open his mouth before God; and yet he comes with boldness to God, and asks him anything he needs. He is so humble as to acknowledge himself to deserve nothing but evil; and yet believes that God means him all good. He is one that fears always, yet is as bold as a lion. He is often sorrowful, yet always rejoicing; many times complaining, yet always giving of thanks. He is the most lowly-minded, yet the greatest aspirer; most contented, yet ever craving.

VII.

He bears a lofty spirit in a mean condition; when he is ablest, he thinks meanest of himself. He is rich in poverty, and poor in the midst of riches. He believes all the world to be his, yet he dares take nothing without special leave from God. He covenants with God for nothing, yet looks for a great reward. He loseth his life and gains by it; and whilst he loseth it, he saveth it.

VIII.

He lives not to himself, yet of all others he is most wise for himself. He denieth himself often, yet no man loveth himself so well as he. He is most reproached, yet most honoured. He hath most afflictions, and most comforts.

IX.

The more injury his enemies do him, the more advantages he gains by them. The more he forsakes worldly things, the more he enjoys them.

X.

He is the most temperate of all men, yet fares most deliciously; he lends and gives most freely, yet he is the greatest

usurer; he is meek towards all men, yet inexorable by men. He is the best child, husband, brother, friend; yet hates father and mother, brother and sister. He loves all men as himself, yet hates some men with a perfect hatred.

XI.

He desires to have more grace than any man hath in the world, yet is truly sorrowful when he seeth any man have less than himself; he knoweth no man after the flesh, yet gives all men their due respects; he knoweth if he please man he cannot be the servant of Christ; yet for Christ's sake he pleaseth all men in all things. He is a peace-maker, yet is continually fighting, and an irreconcileable enemy.

XII.

He believes him to be worse than an infidel that provides not for his family, yet himself lives and dies without care. He accounts all his superiors, yet stands stiffly upon authority. He is severe to his children, because he loveth them; and by being favourable unto his enemy, he revengeth himself upon him.

XIII.

He believes the angels to be more excellent creatures than himself, and yet accounts them his servants. He believes that he receives many good things by their means, and yet he neither prays for their assistance, nor offers them thanks, which he doth not disdain to do to the meanest Christian.

XIV.

He believes himself to be a king, how mean soever he be: and how great soever he be, he thinks himself not too good to be a servant to the poorest saint.

XV.

He is often in prison, yet always at liberty; a freeman, though a servant. He loves not honour amongst men, yet highly prizeth a good name.

XVI.

He believes that God hath bidden every man that doth him good to do so; he yet of any man is the most thankful to them that do aught for him. He would lay down his life to save the soul of his enemy, yet will not adventure upon one sin to save the life of him who saved his.

XVII.

He swears to his own hindrance, and changeth not; yet knoweth that his oath cannot tie him to sin.

XVIII.

He believes Christ to have no need of anything he doth, yet maketh account that he doth relieve Christ in all his acts of charity. He knoweth he can do nothing of himself, yet labours to work out his own salvation. He professeth he can do nothing, yet as truly professeth he can do all things: he knoweth that flesh and blood cannot inherit the kingdom of God, yet believeth he shall go to heaven both body and soul.

XIX.

He trembles at God's word, yet counts it sweeter to him than honey and the honey-comb, and dearer than thousands of gold and silver.

XX.

He believes that God will never damn him, and yet fears God for being able to cast him into hell. He knoweth he shall not be saved by nor for his good works, yet he doth all the good works he can.

XXI.

He knoweth God's providence is in all things, yet is so diligent in his calling and business, as if he were to cut out the thread of his happiness. He believes before-hand that God hath purposed what he shall be, and that nothing can make him to alter his purpose; yet prays and endeavours, as if he would force God to save him for ever.

XXII.

He prays and labours for that which he is confident God means to give; and the more assured he is, the more earnest he prays for that he knows he shall never obtain, and yet gives not over. He prays and labours for that which he knows he shall be no less happy without; he prays with all his heart not to be led into temptation, yet rejoiceth when he is fallen into it; he believes his prayers are heard, even when they are denied, and gives thanks for that which he prays against.

XXIII.

He hath within him both flesh and spirit, yet he is not a double-minded man; he is often led captive by the law of sin, yet it never gets dominion over him; he cannot sin, yet can

do nothing without sin. He doth nothing against his will, yet maintains he doth what he would not. He wavers and doubteth, yet obtains.

XXIV.

He is often tossed and shaken, yet is as mount Sion; he is a serpent and a dove; a lamb and a lion; a reed and a cedar. He is sometimes so troubled, that he thinks nothing to be true in religion; yet if he did think so, he could not at all be troubled. He thinks sometimes that God hath no mercy for him, yet resolves to die in the pursuit of it. He believes, like Abraham, against hope, and though he cannot answer God's logic, yet, with the woman of Canaan, he hopes to prevail with the rhetoric of importunity.

XXV.

He wrestles, and yet prevails; and though yielding himself unworthy of the least blessing he enjoys, yet, Jacob-like, he will not let him go without a new blessing. He sometimes thinks himself to have no grace at all, and yet how poor and afflicted soever he be besides, he would not change conditions with the most prosperous man under heaven, that is a manifest worldling.

XXVI.

He thinks sometimes that the ordinances of God do him no good, yet he would rather part with his life than be deprived of them.

XXVII.

He was born dead; yet so that it had been murder for any to have taken his life away. After he began to live, he was ever dying.

XXVIII.

And though he hath an eternal life begun in him, yet he makes account he hath a death to pass through.

XXIX.

He counts self-murder a heinous sin, yet is ever busied in crucifying the flesh, and in putting to death his earthly members; not doubting but there will come a time of glory, when he shall be esteemed precious in the sight of the great God of heaven and earth, appearing with boldness at his throne, and asking anything he needs, being endued with humility, by acknowledging his great crimes and offences, and that he deserveth nothing but severe punishment.

XXX.

He believes his soul and body shall be as full of glory as them that have more; and no more full than theirs that have less.

XXXI.

He lives invisible to those that see him, and those that know him best do but guess at him; yet those many times judge more truly of him than he doth of himself.

XXXII.

The world will sometimes account him a saint, when God accounteth him a hypocrite; and afterwards, when the world branded him for an hypocrite, then God owned him for a saint.

XXXIII.

His death makes not an end of him. His soul which was put into his body, is not to be perfected without his body; yet his soul is more happy when it is separated from his body, than when it was joined unto it: And his body, though torn in pieces, burnt to ashes, ground to powder, turned to rottenness, shall be no loser.

XXXIV.

His Advocate, his Surety shall be his Judge; his mortal part shall become immortal; and what was sown in corruption and defilement shall be raised in incorruption and glory; and a finite creature shall possess an infinite happiness. Glory be to God.

END OF THE LITERARY WORKS.

PROFESSIONAL WORKS.

GENERAL PREFACE.

THE most important difference between this edition of Bacon's Professional Works and its predecessors results from a careful collation of all accessible MSS., which, with the occasional correction of obvious blunders, has, I believe, made many passages of the text intelligible for the first time.

It will be found also to differ from the common editions by the addition of two Legal Arguments, one of which has been before published in the *Collectanea Juridica*, and of a paper on Bridewell Hospital, which has been printed in the Reports of the Charities Commission; and by some minor variations in the miscellaneous part of the collection.

The preface to each piece gives such information as I have been able to gather tending to elucidate its history and purport; and I have added notes (more freely than I originally intended), most often where former commentators, in MS. or in print, had suggested questions, but sometimes on difficulties which have occurred to myself.

More than this did not seem to be required, and indeed would scarcely have been justifiable in an edition of Bacon's collected Works, when we look to the character of these professional pieces and consider the very subordinate position they occupy in the history of his own literary activity, and the comparatively small influence which, on that if on no other account, they can be supposed to have exercised on the progress of English Law.

None of them were published in Bacon's lifetime. Four *Arguments of Law*, with a dedicatory preface, were prepared by him for publication,—apparently as part of a larger collection,—during the period when he was Solicitor and Attorney General, professedly as specimens of forensic eloquence, and mainly, one may suppose, with a view to establishing or enhancing his own professional reputation. His rapid rise and other avocations may account for the design having been dropt; and at all events

we have no evidence that it was actively pursued after 1616. The argument for the *Postnati*, and some papers relating to the Union, were also corrected by him; but, whether intended for publication or not, they seem to have been collected with a view to furthering that great design of State rather than with any permanent literary purpose.

None of the other works come to us direct from Bacon's hand. Their importance and claims to be considered authentic are various.

The *Use of the Law* appears to me to possess no value, antiquarian or other, at the present day; and in my preface to it I have given my reasons for believing it to be spurious.

There is some obscurity about the date, as a whole, and the dress, of the *Maxims of the Law*, which I have noticed in the preface; but any how, besides its intrinsic merits, it is all that we have, and must be taken as the representative, of a work by which Bacon hoped to obtain reputation as a lawyer rivalling with Coke[1], and which from 1596 to the close of his life he was offering as his own contribution towards that great Instauration of the English Laws, the promotion and direction of which would seem to have been, next to that other Instauration of Natural Science, the most persistent of his nobler aims.

That other scheme, even as an exposition of principles, remained a fragment, and was to a great extent abortive (as I think Mr. Ellis has made it clear), partly because it was premature and based on a misconception and underrating of the conditions and difficulties of the problem, and partly from an inaptitude in Bacon for accurate experimental research. His failure in Law Reform does not appear to me traceable to any similar cause. A Digest of English Law on the principles laid down in the 8th Book *De Augmentis* and in the *Proposal for Amending the Laws* is surely conceivable even now, and would seem the very work for which the times between the middle of Elizabeth's reign and the end of James's were specially fitted. The Year Books were closed and roughly digested by Fitzherbert and Brooke, and the statute laws lay within very manageable compass. Historically, all authoritative maxims of Law were to be extracted from these definite materials; and the theoretical principles necessary for reconciling what was inconsistent and modifying what seemed absurd or unsuitable to the times were

[1] *Proposal for amending the Laws of England.*

equally ready at hand in the Civil Law. There was no lack of men fit to form a good working staff, sages of the English Law never surpassed at home, or learned civilians abroad.

Nor was there any task for which Bacon would seem to have been intellectually better fitted than the superintendence of such a work. It is for his biographer and the historian of these reigns to explain why nothing was done; but the fact that the work is still almost untouched seems to show that the causes lie deeper in the structure of our society than can be laid exclusively to the account of those times or persons.

Although I believe the fragment of the *Maxims* which we have was all written by about 1597, yet I see no reason for doubting that it represents adequately enough in point of workmanship that auxiliary Treatise *De Diversis Regulis Juris*, the nature and purpose of which is given in the 82nd and following aphorisms of the 8th Book *De Augmentis*.[1] But the question how far he had succeeded, or how near he would with encouragement have attained to the completion of his design, must remain unsolved; and I suppose no one will be found to take it up again. It was no less than to extract from the whole body of decided cases, so far as such materials would admit it, the common Rules and Maxims of justice by which they are related to each other, with their limitations and exceptions, exemplified by a sufficient collection of examples. Besides the dangers of fanciful analogies, and the difficulty in many cases of ascertaining the true *ratio decidendi*, it is obvious that the number of accidental or really anomalous decisions would be very great; and indeed one use of the work would have been to point them out for correction, if need were, and avoidance as precedents in new cases. Bacon was fully aware of this, and warns us in his preface that "in some few cases" of his specimen "he did intend expressly to weigh down the authority by evidence of reason," and in fact "to correct the law."[2] This is a matter to be borne in mind, if any lawyer should think it worth while to examine the examples in detail with the authorities.

The *Reading on the Statute of Uses* has perhaps received more attention than the *Maxims*. It has always been cited with

[1] Vol. I. p. 822.

[2] I believe he might have added that in many more cases he has attempted, as it were, to infuse a rational principle into decisions made at haphazard or on accidental grounds.

respect, and was edited in 1804, with notes far exceeding the text in length, by Mr. Rowe. It is however only a fragment of a course which Bacon was called upon to give in Gray's Inn as Double Reader in 1600. It is not mentioned in a list of MS. works on Professional Subjects[1] which he made in 1608; and we do not know to whom we owe the preservation of what we now have, nor whether the rest of the course was ever extant in writing. It may have been delivered *viva voce* or from rough notes; nor would it be inconsistent with the common practice, as shown by the extant records of Gray's Inn, to conjecture that the course may never have been finished. It is however to be observed that the MSS. I have collated, besides breaking off at different points, vary in phraseology in a way hardly to be accounted for but upon the supposition that Bacon himself must have revised the text at least once.

The remainder, besides the additional pieces above mentioned, contains the *Ordinances in Chancery*, in which we may trace with certainty some part to Bacon's own hand, though the main body must be supposed to have previously existed in some shape or other, written or unwritten; and some miscellaneous matter which has been found by collectors and attributed to Bacon, but of which every one is at liberty to form his own judgment from

[1] "July 25. 1608.

Continuatur series librorum cartaceorum.

Libri professoris: v^t. of the Laws of England.

1. Regulæ Juris cum limitationibus et casibus. This is merely a composition of mine own, and not a note-book.
2. Patrocinia et actiones causarum. Arguments in law by me made. This is also a composition; being a book of pleadings; such as Marions in French.
3. Observationes et commentationes in Jure, ex conceptu proprio sparsim intratæ.
4. Observationes et annotationes in Jure, ex libris et Authoribus Juris sparsim intratæ.
5. Digesta in Jure; hoc est, annotationes tam ex conceptu proprio quam ex Authoribus Juris ordinatæ per titulos. A mere common-place book of Law.
6. Exempla Majorum in Jure: containing precedents and usages and courses of Courts, and other matter of experience.
7. Lecta sive specialia in Jure; being notes and conceits of principal use, and entered with choice, both for mine own help, and hereafter per case to publish.
8. Diarium fori. The book I have with me to the Courts, to receive such remembrances as fall out upon that I hear there.
9. Vulgaria in Jure; being the ordinary matters, rules and cases admitted for law; to take away shew of being imperfect or unready in common matters; together with some abridgement of special cases for mine own memory, and all other points for shew and credit of readiness and reading.

Libri concernentes Servitium Regis 4.

Lib. servitii reg. in Parlamento.
Lib. servit. reg. quoad reventiones et Commodum.
Lib. servitii regis quoad causas Justitiæ et forenses.
Lib. servit. reg. quoad causas status."

Commentarius Solutus (the whole of which will be printed in its place among the Occasional Works).

internal evidence, and which I reprint (most of it) only because it has been heretofore printed. The original of this part of the collection, so far as it is genuine, was, I suppose, to be found in the common-place books of various kinds which Bacon kept and has catalogued in the *Commentarius Solutus;* some of them, it is to be observed, containing notes of his own, and some, extracts from other writers. Some pages, it will be seen, have been thus taken and adapted, whether by Bacon or another, from a treatise by Sir John Doderidge, and I think the case must be the same with other fragments.

Besides the works here printed there are some others extant. Mr. Spedding found in the British Museum, Harl. MSS. 7017. No. 43., a MS. in Bacon's hand on the Prerogative. It appeared to me to be merely a common-place book after the fashion of the *Cases of Treason*, &c., setting down the ordinary Common Law Prerogatives, and not to contain anything interesting as regards Bacon's opinions on the Constitution. Mr. Spedding tells me there is in the Cambridge University Library an argument in Law French on the Sutton Hospital Case.[1] The questions in controversy appearing to be of no permanent interest, and Bacon having argued on the losing side with (if Coke is to be trusted) a very weak case, it was not thought worth while to include it in the collection. I have not myself seen it.

There is also in the Stowe Collection, now the property of Lord Ashburnham, a *Reading on Stat. West. 2nd C. 5. On Advowsons.* Bacon's first reading at Gray's Inn was in 1587, not apparently in his regular term, but in the place of a defaulter. If this be the Reading of that period it would be the earliest extant of his legal works. I should have been glad to have been able to see and, if of sufficient importance, to publish it; and I tried, through several channels of communication and by personal application, to obtain access to the collection; but his Lordship's rule requiring an introduction by a personal acquaintance of his own and of the applicant, being strictly enforced, has proved a bar.

In the same collection is a MS. of the *Reading on the Statute of Uses*, the character and completeness of which I have, for the same reason, had no opportunity of ascertaining. There is also

[1] See 10 Rep. 1.

a MS. of the Argument in *Brownlow and Mitchell.* It was from the printed catalogue of the Stowe MSS. that Mr. Spedding first learnt that this Argument was extant, and it was only after our failure to obtain access to it that we discovered it was already in print,—whether from this source or not we have no means of judging.

D. D. HEATH.

MAXIMS OF THE LAW.

PREFACE.

I HAVE already observed that it is difficult to account for the shape in which this treatise comes to us, or to fix its date.

The difficulty arises from the Preface, which dwells at length on the reasons which have influenced Bacon to retain Law French as the language of his expositions; whereas what we have is in English, and I think in good Baconian style. It is certain the Preface and Text, as they stand, were never intended to be published together; and the question is, as to the relation between them.

The first edition was in 1630, with the second edition of the *Use of the Law:* a common title, *The Elements of the Common Law*, being prefixed, as well as a separate one to each part. The Text agrees pretty closely with that of Harl. MSS. 1783. and with a MS. at Lincoln's Inn, and is reprinted in Mr. Montagu's edition. There are two other MSS. in the Harleian Collection, Nos. 856. and 6688., generally representing the text of the common edition.

The Lincoln's Inn MS. contains only the first paragraph of the Preface, and the 25th Rule is inserted before the 23rd, as it is also in the first edition. The last three Rules are added after a "finis," and in a different hand, in Harl. MSS. 1783.; and though they are all in the index of Harl. MSS. 6688. the text ends with the heading of No. 23. In other respects the differences in these texts are merely verbal and throw no light on the subject I am discussing.[1]

But besides these, there is a MS. in the University Library at Cambridge, bearing the name and date "Thos. Corie, Hosp. Graii, 1630," which differs so widely from the others that I

[1] In Harl. MSS. 6688. there are one or two additional examples given in very slip-slop Anglo-French, which I have not noticed as they may as well be a transcriber's addition as Bacon's own.

have thought it advisable to give the principal variations in foot-notes, as they show something of the history of the work.

The dedication in the other MSS. and editions bears date Jan^{y} or Jan^{y} 8th, 1596 (i. e. 1596-7). In the Camb. MS. it ismerely 1596, i. e. any time between March 25th 1596, and March 24th 1597; and it seems clear, as I have pointed out in a note, that it was an earlier draft, and that shortly after its composition — may we not say after its presentation? — Bacon had the interview or communication with the Queen to which he alludes in the later draft.

In the Camb. MS. there are only 20 Rules, instead of 25; they stand in a different order [1]; and there are in many Rules fewer examples, as well as considerable variations in the phraseology and sense.

My own impression is that the shorter text has been expanded into, and not abridged from, the longer. But it is of more importance to observe that whereas it is clear that Bacon, while at work on either text, had before him cases adjudged as late as 37° Eliz. — i. e. 1594 and 1595, — I have failed to find any indication in the marginal references, which so abound in some of the MSS. and editions, of any use of later cases.[2] If this be the fact, it seems to me quite conclusive that these English texts belong entirely to a period of Bacon's life contemporary with, or prior to, the date of his Dedication, and are not chance fragments from the larger Collection at which he tells us, when Attorney General, he had recently been and hoped to continue working.[3]

The Preface contains no internal marks to fix its date. Besides the omission of the main part of it in the Lincoln's Inn MS. it may be observed that in the Camb. MS. it appears to be designed to introduce exactly one hundred Rules, instead of the "some few" of the common text.

On the whole, I think the probable solution is, that at an early date in Bacon's law studies he conceived the thought of such a treatise *De Regulis Juris* as he advocates in the *De Augmentis* and in the *Proposals*, and began to work at it "more

[1] Nos. 1 to 20 in the Camb. MS. correspond with Nos. 5, 6, 7, 8, 11, 18, 15, 16, 12, 1, 2, 19, 21, 20, 22, 9, 25, 3, 23, 24, in the text.

[2] See notes in the 1st and 3rd Rules. The latter may perhaps suggest that the longer text was in hand some time in 1597, or may be 1598.

[3] *Proposal for amending the Laws of England.* See also the list of his law manuscripts in the *Commentarius solutus.*

cursorily,"[1] by noting down Maxims in Latin, and examples in the language in which he found them, not caring "to hunt after words but matter:" that after the Queen's speech and the ensuing debate in the Parliament of 35° Eliz. to which he refers in the Dedication, and in which he took a part, he prepared a careful specimen of the work in English, and may have shown it, with the first Dedication, to the Queen or her ministers: that he was encouraged by "that which he was afterwards vouchsafed to understand from Her Majesty," and not only retouched his Dedication but enlarged his specimen: that he may perhaps have written the first paragraph of the Preface, as it appears in the Lincoln's Inn MS., before he altered his plan; but that before he finished the Preface he had changed his mind, and intended to publish in Law French one hundred, if he could arrange so many in a satisfactory state, or at any rate "some few."

Whether the "*Regulæ Juris, cum limitationibus et casibus,*" described among his MSS. in 1608[2] as "merely a composition of his own and not a note book," was the work we have, or an ampler collection in another form, I know no means of determining; but for the reasons above given, I conceive we have here no trace of the result of the later labours spoken of in the *Proposals.*

I believe the present text, formed by a free use of all the MSS. and editions, and with scarcely any purely conjectural emendation, will be found much improved. Any such conjectures I have duly noticed, and where a difficulty without a solution has occurred to me I have called attention to it. Where I have made any observation on the law, it has generally been because I found some early annotator (in the first edition or in some MS.) has already put a *query,* but I have not thought it generally necessary to examine doubtful points, especially with the warning Bacon himself gives us that he did not always mean to be bound by authority.

Bacon did not intend to give any references to cases. Nevertheless, some of them seem manifestly to refer to manuscript authority, giving only the year of Elizabeth's reign, and to have been about contemporaneous with the text.[3] These I have

[1] *Proposal for amending the Laws.*
[2] *Commentarius solutus.*
[3] See note in 1st Rule.

preserved. The references to the Year Books seem to have accumulated under the hands of transcribers, — and very carelessly. I have expunged a great many which seemed to me clearly irrelevant, but do not feel confident that all which I have retained will be found correct or worth consulting.[1] Where I found a reference to Brook or Fitzherbert, I have thought that sufficient and suppressed the Year Book; the abridgments being much the pleasanter references, and giving any reader the opportunity of further investigation if he thinks it worth while.

[1] Those in brackets have not been verified.

TO HER SACRED MAJESTY.

I DO here most humbly present and dedicate to your Majesty a sheaf and cluster of fruit of that good and favourable season, which by the influence of your happy government we enjoy. For if it be true that *silent leges inter arma*, it is also as true, that your Majesty is in a double respect the life of our laws; once, because without your authority they are but *litera mortua*; and again, because you are the life of our peace, without which laws are put to silence. And as the vital spirits do not only maintain and move the body, but also contend to perfect and renew it, so your sacred Majesty, who is *anima legis*, doth not only give unto your laws force and vigour, but also hath been careful of their amendment and reforming. Wherein your Majesty's proceeding may be compared, as in that part of your government, (for if your government be considered in all the parts, it is incomparable,) with the former doings of the most excellent princes that have reigned, who have ever studied to adorn and honour times of peace with the amendment of the policy of their laws.

Of this proceeding in Augustus Cæsar the testimony remaineth:

Pace data terris, animum ad civilia vertit
Jura suum; legesque tulit justissimus auctor.

Hence was collected the difference between *gesta in armis* and *acta in toga*, whereof he disputeth thus:

Ecquid est, quod tam propriè dici potest actum ejus qui togatus in republica cum potestate imperioque versatus sit quam lex? quære acta Gracchi: leges Semproniæ proferentur. Quære Syllæ: Corneliæ. Quid? Cn. Pompeii tertius consulatus in quibus actis consistit? nempe in legibus. A Cæsare ipso si quæreres quidnam egisset in urbe et toga: leges multas se responderet, et præclaras tulisse.

The same desire long after did spring in the emperor Justinian, being rightly called *ultimus Imperatorum Romanorum;* who, having peace in the heart of his empire, and making his wars prosperously in the remote places of his dominions by his lieutenants, chose it for a monument and honour of his government, to revisit the Roman laws, and to reduce them from infinite volumes and much repugnancy into one competent and uniform corps of law. Of which matter himself doth speak gloriously, and yet aptly, calling it *proprium et sanctissimum templum Justitiæ consecratum:* a work of great excellency indeed, as may well appear, in that France, Italy, and Spain, which have long ago shaken off the yoke of the Roman empire, do yet nevertheless continue to use the policy of that law: but more excellent had the work been, save that the more ignorant and obscure time undertook to correct the more learned and flourishing time. To conclude with the domestical example of one of your Majesty's royal ancestors: King Edward I. your Majesty's famous progenitor, and principal lawgiver of our nation, after he had in his younger years given himself satisfaction in the glory of arms, by the enterprise of the Holy Land, having inward peace, (otherwise than for the invasions which himself made upon Wales and Scotland, parts far distant from the centre of the realm,) he bent himself to endow his state with sundry notable and fundamental laws, upon which the government ever since hath principally rested.[1]

Of these examples, and others the like, two reasons may be given; the one, because that kings, which, either by the moderation of their natures, or the maturity of their years and judgment, do temper their magnanimity with justice, do wisely consider and conceive of the exploits of ambitious wars, as actions rather great than good; and so, distasted with that course of winning honour, they convert their minds rather to do somewhat for the better uniting of human society, than for the dissolving or disturbing of the same. Another reason is, because times of peace, drawing for the most part with them abundance

[1] The Cambridge MS. here adds: — "And lastly, the King Your Majesty's father had this royal design in such regard and so deeply looked into the state of his laws, as it is to be seen that he made more statutes (not speaking of penal laws, but such as were in amendment of the common laws) than all the Kings between him and the same King Edward I. and that specially in the 32nd year of his reign, what time this kingdom flourished in peace."

A less courtly or more mature judgment of Henry VIII.'s merits as a lawgiver is found in the *Offer of a Digest of the Laws of England.*

of wealth and fineness of cunning, do draw also, in further consequence, multitude of suits and controversies, and abuses of laws by evasions and devices; which inconveniences in such times growing more general, do more instantly solicit for the amendment of laws to restrain and repress them.

Your Majesty's reign having been blest from the Highest with inward peace, and falling into an age wherein, if science be increased, conscience is rather decayed; and if men's wits be great, their wills be more great; and wherein also laws are multiplied in number, and slackened in vigour and execution; it was not possible but that not only suits in law should multiply and increase, whereof always a great part are unjust, but also that all the indirect and sinister courses and practices to abuse law and justice should have been much attempted and put in ure: which no doubt had bred greater enormities, had they not, by the royal policy of your Majesty, by the censure and foresight of your Council table and Star-chamber, and by the gravity and integrity of your Benches, been repressed and refrained: for it may be truly observed, that, as concerning frauds in contracts, bargains, and assurances, and abuses of laws by delays, covins, vexations, and corruptions in informers, jurors, ministers of justice, and the like, there have been sundry excellent statutes made in your Majesty's time, more in number, and more politic in provision, than in any your Majesty's predecessors' times.[1]

[2] But I am an unworthy witness to your Majesty of a higher

[1] It may be worth noting that this praise of the Council and Star Chamber are not in the earlier draft. The Camb. MS. in lieu of this whole paragraph commencing "Your Majesty's reign" has: "But your Majesty's time, coming so soon after the reforming of so many imperfections in the common laws as were by the statutes of the King your father removed, needed the less to add further correction to them by way of statutes. It is frauds in contracts, bargains, and assurances, and abuses of laws by delays, covins, vexations and corruptions in informers, jurors, ministers of justice, and the like, which do now most call for redress, wherein there have been sundry excellent statutes" &c.

[2] The variation here in the Camb. MS. seems to fix its date. It has: "Above all the rest, I cannot forget your Majesty's most regal and famous intention, compounded both of justice and clemency, which was published by your Chancellor in full Parliament from your royal mouth in the 35th of your happy reign, of purging and removing the multitude of unnecessary penal laws which now lie upon your people as the rain whereof the Psalm speaks, *Pluet super eos laqueos*, to their infinite [interest] and peril, and besides doth breed another inconvenience as ill as the former, in that the cessation and abstinence to execute these unnecessary laws doth mortify the execution of such laws as are wholesome and most meet to be put in execution both for your Majesty's profit and the universal benefit of the realm. Which intention as it was no doubt a precious seed sown in your Majesty's heart by the Divine hand that holdeth it, so I hope in the maturity of your Majesty's own times will come up and bear fruit, being as a tree of *Balsamum* to cure and salve the wounds and dangers of your subjects. Wherefore, observing" &c.

This first draft, therefore, was written when his knowledge of any intended legal

intention and project, both by that which was published by your Chancellor in full parliament from your royal mouth, in the five and thirtieth of your happy reign; and much more by that which I have since been vouchsafed to understand from your Majesty, importing a purpose for these many years infused in your Majesty's breast, to enter into a general amendment of the state of your laws, and to reduce them to more brevity and certainty; that the great hollowness and unsafety in assurances of lands and goods may be strengthened; the snaring penalties that lie upon many subjects removed; the execution of many profitable laws revived; the judge better directed in his sentence; the counsellor better warranted in his counsel; the student eased in his reading; the contentious suitor that seeketh but vexation disarmed; and the honest suitor that seeketh but to obtain his right relieved. Which purpose and intention, as it did strike me with great admiration when I heard it, so it must be acknowledged to be one of the most chosen works, of highest merit and beneficence towards the subject, that ever entered into the mind of any king: greater than we can imagine; because the imperfections and dangers of the laws are covered under the clemency and excellent temper of your Majesty's government. And though there be rare precedents of it in government, as it cometh to pass in things so excellent, (there being no precedent full in view but of Justinian,) yet I must say as Cicero said to Cæsar, *Nihil vulgare te dignum videri potest.* And as it is no doubt a precious seed sown in your Majesty's heart by the hand of God's divine Majesty, so I hope in the maturity of your Majesty's own times it will come up and bear fruit.

But to return thence whither I have been carried; observing in your Majesty upon so notable proofs and grounds this disposition in general of a prudent and royal regard to the amendment of your laws, and having by my private travel collected many of the grounds of the common laws, the better to establish and settle a certain sense of law which doth now too much waver in incertainty, I conceived the nature of the subject, besides my particular obligation, was such, as I ought not to

reform was confined to the Lord Keeper's speech and the debate (in which he took a part and used some of the same topics which here appear) 35° Elizabeth: the later form belongs to a time when he had personal communications with the Queen or her ministers.

dedicate the same to any other than to your sacred Majesty; both because, though the collection be mine, yet the laws are yours; and because it is your Majesty's reign that hath been as a goodly and seasonable spring weather to the advancing of all excellent arts of peace. And so concluding with a prayer answerable to the present argument, which is, that God will continue your Majesty's reign in a happy and renowned peace, and that he will guide both your policy and arms to purchase the continuance of it with surety and honour, I most humbly crave pardon, and commend your Majesty to the Divine preservation.[1]

Your Sacred Majesty's most humble

and obeying Subject and Servant,

FRANCIS BACON.

Jan^{y} 8th. 1596.

[1] The Camb. MS. ends here with only the date 1596.

THE PREFACE.

I HOLD every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance. Having therefore from the beginning come to the study of the laws of this realm with a mind and desire no less (if I could attain unto it) that the same laws should be the better by my industry, than that myself should be the better by the knowledge of them; I do not find that, by mine own travel, without the help of authority, I can in any kind confer so profitable an addition unto that science, as by collecting the rules and grounds dispersed throughout the body of the same laws: for hereby no small light will be given, in new cases and such wherein there is no direct authority, to sound into the true conceit of law by depth of reason; in cases wherein the authorities do square and vary, to confirm the law, and to make it received one way; and in cases wherein the law is cleared by authority, yet nevertheless to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation somewhat the more settle and be corrected. Neither will the use hereof be only in deciding of doubts, and helping soundness of

judgment, but further in gracing of argument; in correcting unprofitable subtlety, and reducing the same to a more sound and substantial sense of law; in reclaiming vulgar errors, and generally in the amendment in some measure of the very nature and complexion of the whole law. And therefore the conclusions of reason of this kind are worthily and aptly called by a great civilian *legum leges;* for that many *placita legum*, that is, particular and positive learnings of laws, do easily decline from a good temper of justice, if they be not rectified and governed by such rules.[1]

Now for the manner of setting down of them, I have in all points to the best of my understanding and foresight applied myself, not to that which might serve most for the ostentation of mine own wit or knowledge, but to that which may yield most use and profit to the students and professors of our laws.

And therefore, whereas these rules are some of them ordinary and vulgar, that now serve but for grounds and plain songs to the more shallow and impertinent sort of arguments; other of them are gathered and extracted out of the harmony and congruity of cases, and are such as the wisest and deepest sort of lawyers have in judgment and use, though they be not able many times to express and set them down: for the former sort, (which a man that should write rather to raise a high opinion of himself than to instruct others would have omitted, as trite and within every man's compass,) yet nevertheless I have not affected to neglect them; but having chosen out of them such as I thought good, I have reduced them to a true application, limiting and defining their bounds, that they may not be run upon at large, but restrained to point of difference. For as, both in the law and other sciences, the handling of questions by commonplace, without aim or application, is the weakest; so yet nevertheless many common principles and generalities are not to be contemned, if they be well derived and deduced into particulars, and their limits and exclusions duly assigned.[2] For there be two contrary faults and extremities in the debating and sifting out of the law, which may be best noted in two several manner of arguments: some argue upon general grounds, and come not near the point in question; others, without laying any foundation of a ground or difference or reason, do loosely put cases,

[1] The Preface ends here in the Lincoln's Inn MS.
[2] The Camb. MS. omits this paragraph.

which, though they go near the point, yet being put so scattered, prove not; but rather serve to make the law appear more doubtful than to make it more plain.

Secondly, whereas some of these rules have a concurrence with the civil Roman law, and some others a diversity, and many times an opposition; such grounds as are common to our law and theirs I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me, and not borrowed or translated from them: no, but I took hold of it as matter of great authority and majesty, to see and consider the concordance between the laws penned and as it were dicted *verbatim* by the same reason. On the other side, the diversities between the civil Roman rules of law and ours, —happening either when there is such an indifferency of reason so equally balanced, as the one law embraceth one course, and the other the contrary, and both just after either is once positive and certain, or where the laws vary in regard of accommodating the law to the different considerations of estate,—I have not omitted to set down with the reasons.

Thirdly, whereas I could have digested these rules into a certain method or order, which, I know, would have been more admired, as that which would have made every particular rule, through his coherence and relation unto other rules, seem more cunning and more deep; yet I have avoided so to do, because this delivering of knowledge in distinct and disjoined aphorisms doth leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications.[1] For we see all the ancient wisdom and science was wont to be delivered in that form; as may be seen by the parables of Solomon, and by the aphorisms of Hippocrates, and the moral verses of Theognis and Phocylides: but chiefly the precedent of the civil law, which hath taken the same course with their rules, did confirm me in my opinion.

Fourthly, whereas I know very well it would have been more plausible and more current, if the rules with the expositions of them had been set down either in Latin or in English, that the harshness of the language might not have disgraced the matter, and that civilians, statesmen, scholars, and other sensible men might not have been barred from them; yet I have forsaken

[1] The Camb. MS. leaves out from this word to "chiefly" inclusive, and substitutes the word "wherein."

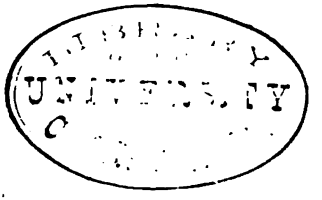
that grace and ornament of them, and only taken this course: the rules themselves I have put in Latin (not purified further than the propriety of terms of law would permit; but Latin); which language I chose, as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument: and for the expositions and distinctions, I have retained the peculiar language of our law, because it should not be singular among the books of the same science, and because it is most familiar to the students and professors thereof, and besides that it is most significant to express conceits of law; and to conclude, it is a language wherein a man shall not be enticed to hunt after words but matter. And for excluding any others than professed lawyers, it was better manners to exclude them by the strangeness of the language, than by the obscurity of the conceit; which is such as, though it had been written in no private and retired language, yet by those that are not lawyers would for the most part have been either not understood, or, which is worse, mistaken.

Fifthly, whereas it might have been more flourish and ostentation of reading to have vouched the authorities, and sometimes to have enforced or noted upon them; yet I have abstained from that also. And the reason is, because I judged it a matter undue and preposterous to prove rules and maxims; wherein I had the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the institutions of the laws of England: whereof the one forbeareth to vouch any authority altogether; the other never reciteth a book, but when he thinketh the case so weak of credit in itself as it needeth a surety. And these two I did far more esteem than Mr. Perkins or Mr. Standford, that have done the contrary. Well will it appear to those that are learned in the laws, that many of the cases are judged cases, either within the books or of fresh report, and most of them fortified by judged cases and similitude of reason; though, in some few cases, I did intend expressly to weigh down the authorities by evidence of reason, and therein rather to correct the law, than either to soothe a received error, or by unprofitable subtlety, which corrupteth the sense of the law, to reconcile contrarieties. For these reasons I resolved not to derogate from the authority of the rules by vouching of the authority of the cases, though in mine own copy I had them quoted: for although the mean-

ness of mine own person may now at first extenuate the authority of this collection, and that every man is adventurous to control; yet, surely, according to Gamaliel's reason, if it be of weight, time will settle and authorise it; if it be light and weak, time will reprove it. So that, to conclude, you have here a work without any glory of affected novelty, or of method, or of language, or of quotations and authorities, dedicated only to use, and submitted only to the censure of the learned, and chiefly of time.

Lastly, there is one point above all the rest I account the most material for making these rules indeed profitable and instructing; which is, that they be not set down alone, like short dark oracles, which every man will be content still to allow to be true, but in the meantime they give little light or direction; but I have attended them, (a matter not practised, no not in the civil law to any purpose, and for want whereof, indeed, the rules are but as proverbs, and many times plain fallacies,) with a clear and perspicuous exposition; breaking them into cases, and opening their sense and use and limiting them with distinctions; and sometimes showing the reasons above whereupon they depend, and the affinity they have with other rules. And though I have thus, with as good discretion and foresight as I could, ordered this work, and, as I might say, without all colours or shows, husbanded it best to profit; yet, nevertheless, not wholly trusting to mine own judgment; having collected three hundred of them, I thought good, before I brought them all into form, to publish some few[1]; that by the taste of other men's opinions in this first, I might receive either approbation in mine own course, or better advice for the altering of the other[1] which remain. For it is great reason that that which is intended to the profit of others should be guided by the conceits of others.

[1] The Camb. MS. has "to publish the first," and afterwards "for the altering of the other two."



REGULÆ.

1. In jure non remota causa, sed proxima spectatur.
2. Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.
3. Verba fortius accipiuntur contra proferentem.
4. Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem.
5. Necessitas inducit privilegium quoad jura privata.
6. Corporalis injuria non recipit æstimationem de futuro.
7. Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.
8. Æstimatio præteriti delicti ex post facto nunquam crescit.
9. Quod remedio destituitur ipsa re valet, si culpa absit.
10. Verba generalia restringuntur ad habilitatem rei vel personæ.
11. Jura sanguinis nullo jure civili dirimi possunt.
12. Receditur a placitis juris potius quam injuriæ et delicta maneant impunita.
13. Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.
14. Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.
15. In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.
16. Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.
17. De fide et officio judicis non recipitur quæstio, sed de scientia, sive error sit juris sive facti.
18. Persona conjuncta æquiparatur interesse proprio.
19. Non impedit clausula derogatoria quominus ab eadem potestate res dissolvantur a quibus[1] constituuntur.

[1] So, I believe, in all the MSS. and editions, and therefore the slip is probably of Bacon's pen.

20. Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest.

21. Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non fulcitur.

22. Non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit.

23. Licita bene miscentur, formula nisi juris obstet.

24 Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.

25. Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.

THE

MAXIMS OF THE LAW.

REGULA I.

In jure non remota causa, sed proxima spectatur.

It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree.

As if an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access unto him for his counsel; yet, nevertheless, the annuity is not determined by this *non-feasance*. Yet it was the grantee's act and default to commit the treason, whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory and not voluntary, in regard of the imprisonment. 6 H. 8. Dy. f. 1, 2.

So if a parson make a lease, and be deprived, or resign, the successor shall avoid the lease: and yet the cause of deprivation, and more strongly of a resignation, moved from the party himself: but the law regardeth not that; because the admission of the new incumbent is the act of the ordinary.[1] Litt. secs. 643. et seq. 2 H. 4. f. 5. p. 18. 26 H. 8. f. 2. pl. 3.

[2] So if I be seised of an advowson in gross, and a usurpation be had against me, and at the next avoidance I usurp arere, I shall be remitted: and yet the presentation, which is the act remote, is mine own act; but the admission of my clerk, whereby the inheritance is reduced to me, is the act of the ordinary. 5 H. 7. f. 35. pl. 3.

[1] The Cambridge MS. states the law as to deprivation only; adding: "But of a resignation it is otherwise; for that is merely the act of the party."

[2] Omitted in Camb. MS.

So if I covenant with I. S. a stranger, in consideration of natural love to my son, to stand seised to the use of the said I. S. to the intent he shall enfeoff my son; by this no use ariseth to I. S. because the law doth respect that there is no immediate consideration between me and I. S.

Dy. f. 1. 12 H. 4. f. 23. pl. 6.

[1]So if I be bound to enter into a statute before the mayor of the staple at such a day for the security of a hundred pounds, and the obligee, before the day, accept of me a lease of a house in satisfaction; this is no plea in debt upon my obligation: and yet the end of that statute was but security of money; but because the entering into this statute itself, which is the immediate act whereto I am bound, is a corporal act which lieth not in satisfaction, therefore the law taketh no consideration that the remote intent was for money.

Winnington's case, 2 Co. 59. [2][37 El. Chester.]

So if I make a feoffment in fee upon condition that the feoffee shall enfeoff over, and the feoffee be disseised, and a descent cast, and then the feoffee bind himself in a statute, which statute is discharged before the recovery of the land: this is no breach of the condition, because the land was never liable to the statute; and the possibility that it should be liable upon the recovery the law doth not respect.

So if I enfeoff two upon condition to enfeoff, and one of them take a wife; the condition is not broken: and yet there is a remote possibility that the joint-tenant may die, and then the feme is intitled to dower.

See Blackstone Com. Book 2. c. 14.

So if a man purchase land in fee-simple, and die without issue: in the first degree the law respecteth dignity of sex, and not proximity; and therefore the remote heir on the part of the father shall have it before the near heir on the part of the mother: but in any degree paramount the first the law respecteth it not; and therefore the near heir by the grandmother on the part of the father shall have it before the remote heir of the grandfather on the part of the father.

This rule faileth in covinous acts, which though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act.

[37 Eliz. Ducre's case, obiter.]

As if a feoffment be made of lands held by knight's service to

[1] Omitted in Camb. MS.

[2] This marginal reference must have been made, I think, while the case stood as a judgment of the court at Chester, and before it was brought before the Queen's Bench.

I. S. upon condition that he within a certain time shall enfeoff I. D. which feoffment to I. D. shall be to the use of the wife of the first feoffor for her jointure, &c.; this feoffment is within the statute of 32 H. VIII. *nam dolus circuitu non purgatur.*

In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion. As if I. S. of malice prepense discharge a pistol at I. D. and miss him, whereupon he throws down his pistol and flies, and I. D. pursueth him to kill him, whereupon he turneth and killeth I. D. with a dagger; if the law should consider the last impulsive cause, it should say that it was in his own defence: but the law is otherwise, for it is but a pursuance and extention of the first murderous intent. [1] But if I. S. had fallen down, his dagger drawn, and I. D. had fallen by haste upon his dagger, there I. D. had been *felo de se*, and I. S. should go quit.

[Cattelyn and others in Stoel's case.]

44 Ed. 3. f. 44. pl. 55.

Also you may not confound[2] the act with the execution of the act; nor the entire act with the last part, or the consummation of the act.

For if a disseisor enter into religion, the immediate cause is from the party, though the descent be cast by act in law: but the law doth but execute the act which the party procureth; and therefore the descent shall not bind. *Et è converso;* If a lease for years be made rendering rent, and the lessee make a feoffment of part, and the lessor enter; the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party: but that is but the pursuance and putting in execution of the title which the law giveth; and therefore the rent or condition shall be apportioned.

Lit. sec. 410.

[21 Eliz.] Dy. f. 4, 5.

[3] So in the binding of a right by a descent, you are to consider the whole time from the disseisin to the descent cast; and if at all times the person be not privileged, the descent binds.

And therefore, if a feme covert be disseised, and the baron dieth, and she taketh a new husband, and then the descent is

9 H. 7. 24. Dy. f. 143, 144.

[1] Omitted in Camb. MS.

[2] The Camb. MS. has: "the act itself with the execution only of the act, and so the cause of the act with the cause of the execution of the act, and by that means make the immediate cause a remote cause."

[3] The remaining cases under this rule are omitted in the Camb. MS. They would not have illustrated the rule as there enunciated, and given in the preceding note.

cast; or if a man that is not *infra quatuor maria* be disseised, and return into England, and go over sea again, and then a descent is cast; this descent bindeth, because of the *interim* when the persons might have entered: and the law respecteth not the state of the person at the last time of the descent cast, but a continuance from the very disseisin to the descent.

Dy. f. 159. So if baron and feme be, and they join in a feoffment of the wife's land rendering a rent, and the baron die, and the feme take a new husband before any rent-day, and he accept the rent; the feoffment is affirmed for ever.

REGULA II.

Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.

It were impertinent and contrary in itself for the law to[1] allow of a plea in bar of such matter as is to be defeated by the same suit: for it is included; and otherwise a man should never come to the end and effect of his suit, but be cut off in the way.

And therefore, if tenant in tail of a manor whereunto a villain is regardant discontinue, and die, and the right of the entail descend unto the villain himself, who brings *formedon*, and the discontinuee pleadeth villenage; this is no plea: because the *devester* of the manor, which is the intention of the suit, doth include this plea; because it determineth the villenage.

50 E. 3. f. 24. pl. 16. [2]So if tenant in ancient demesne be disseised by the lord, whereby the seigniory is suspended, and the disseisee bring his assize in the court of the lord, frank fee is no plea: because the suit is to undo the disseisin, and so to revive the seigniory in ancient demesne.

So if a man be attainted and executed, and the heir bring error upon the attainder, and corruption of blood by the same attainder be pleaded to interrupt his conveying in the same writ of error; this is no plea: for then he were without remedy ever to reverse the attainder.[3]

[1] The Camb. MS. has: "to give a man remedies, and then to cut him off the means to come at the effect of his suit by an allegation collateral, which the principal suit doth include and make an end of."

[2] Omitted in Camb. MS.

[3] The Camb. MS. cites 11 Hen. 4. fo. 65, pl. 22, the case of executors bringing error to reverse an outlawry, which may have suggested or confirmed Bacon in his

So if tenant in tail discontinue for life rendering rent, and the issue brings *formedon*, and the warranty of his ancestor with assets is pleaded against him, and the assets is layed to be no other but his reversion with the rent; this is no plea: because the *formedon*, which is brought to undo this discontinuance, doth inclusively undo this new reversion in fee, and the rent thereunto annexed. 32 Ed. 3. f. 22.

But whether this rule may take place where the matter of the plea is not to be avoided in the same suit, but in another suit, is doubtful: and I rather take the law to be, that this rule doth extend to such cases, where otherwise the party were at a mischief, in respect the exceptions and bars might be pleaded cross, either of them in the contrary suit, and so the party altogether prevented and intercepted to come by his right.[1]

So if a man be attainted by two several attainders, and there is error in them both, there is no reason but there should be a remedy open for the heir to reverse those attainders, being erroneous, as well if they be twenty as one. And therefore if, in the writ of error brought by the heir of one of them, the other attainder should be a plea peremptorily; and so again, in error brought of that other, the former should be a plea; this were to exclude him utterly of his right: and therefore it shall be a good replication, to say that he hath a writ of error depending of that also; and so the court shall proceed: but no judgment shall be given till both pleas be discussed; and if either plea be found without error, there shall be no reversal either of the one or of the other; and if he discontinue either writ, then shall it be no longer a plea. [2] And so of several outlawries in a personal action.

And this seemeth to be more reasonable, than that generally an outlawry or an attainder should be no plea in a writ of error brought upon a diverse outlawry or attainder, as 7 H. IV. and 7 H. VI. seem to hold. For that is a remedy too large for the mischief; for there is no reason, if any of the outlawries or 7 H. 4. f. 30. pl. 4. 7 H. 6. f. 44. pl. 22.

principle. "Conveying" here and below seems to mean "claiming" or "deriving title."

[1] The Camb. MS. has: "This rule may be extended upon the general reason thereof; which is this: that when the law seeth that a man hath right, it will not prevent him of the means to recover it. And therefore though the exception be not comprehended in the same suit, but be out of it, yet, if there be remedy also to defeat that impediment by another suit, the law will not permit the party to be at a mischief, and [that] the exceptions should be pleaded cross either of them in the other suit."

[2] This last sentence and the whole of the following paragraph are omitted in the Camb. MS.

attainders be indeed without error, but it should be a peremptory plea to the person in a writ of error, as well as in any other action.

But if a man levy a fine *sur conusaunce de droit come ceo que il ad de son done,* and suffer a recovery of the same lands, and there be error in them both; he cannot bring error first of the fine, because by the recovery his title of error is discharged and released in law *inclusivè:* but he must begin with the error upon the recovery, (which he may do, because a fine executed barreth no titles that accrue *de puisne temps* after the fine levied,) and so restore himself to his title of error upon the fine. But so it is not in the former case of the attainder; for a writ of error to a former attainder is not given away by a second, except it be by express words of an act of parliament, but only it remaineth a plea to his person while he liveth, and to the conveyance of the heir after his death.

[37 Eliz.]

But if a man levy a fine where he hath nothing in the land, which inureth by way of conclusion only, and is executory against all purchases and new titles which shall grow to the conusor afterwards, and he purchase the land, and suffer a recovery to the conusee, and in both fine and recovery there is error; this fine is *Janus bifrons,* and will look forwards to bar him of his writ of error brought of the recovery; and therefore it will come to the reason of the first case of the attainder, that he must reply that he hath a writ also depending of the same fine, and so demand judgment.[1]

To return to our first purpose: like law is it if tenant in tail of two acres make two several discontinuances to several persons for life rendering rent, and the issue after his death bringeth *formedon* of both, and in the *formedon* brought of white acre the reversion and rent reserved upon black acre is pleaded, and so contrary. I take it to be a good replication, that he hath *formedon* also upon that depending, whereunto the tenant hath pleaded the descent of the reversion of white acre; and so neither shall be a bar. [2] And yet there is no doubt but, if in a *formedon* the warranty of tenant in tail with assets be pleaded,

Fitz. Tit. Age, pl. 45.

[1] In lieu of the two preceding paragraphs the Camb. MS. has: "But if a man levy many fines of the same lands and there be an error in them all, yet he cannot bring error of any save the last: because by his own later fines he gave away his title of error to the former fines *inclusivè*. But when a man is attainted, his writ of error to a former attainder is not given away, but only it remaineth a plea to his person while he liveth, and to the conveyance of the heir after his death."

[2] This is omitted, to the end, in Camb. MS.

it is no replication for the issue to say that a *præcipe* dependeth brought by I. S. to evict the assets. But the former case standeth upon the particular reason before mentioned.

REGULA III.

Verba fortius accipiuntur contra proferentem.

THIS rule, that a man's deeds and his words shall be taken strongliest against himself, though it be one of the most common grounds of the law, it is notwithstanding a rule drawn out of the depth of reason. For, first, it is a schoolmaster of wisdom and diligence in making men watchful in their own business; next, it is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and secondly, because it makes an end of many questions and doubts about construction of words; for if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law more certainly one way.

[1] But this rule, as all others which are very general, is but a sound in the air, and cometh in sometimes to help and make up other reasons without any great instruction or direction, except it be duly conceived in point of difference, where it taketh place, and where not. And first we will examine it in grants; and then in pleadings.

The force of this rule is in three things: in ambiguity of words; in implication of matter; and in reducing and qualifying the exposition of such grants as were against the law, if they were taken according to their words.

And, therefore, if I. S. submit himself to arbitrement of all actions and suits between him and I. D. and I. N., it rests ambiguous whether this submission shall be intended *collectivè* of joint actions only, or *distributivè* of several actions also: but because the words shall be strongliest taken against I. S. that speaks them, it shall be understood of both. For if I. S. had submitted himself to arbitrement of all actions and suits which he hath now depending, except it be such as are between him

2 R. 2. f. 18. pl. 46. 21 H. 7 f. 29. pl. 3.

[1] Omitted in Camb. MS.

and I. D. and I. N., now it shall be understood *collectivè* only of joint actions: because in the other case large construction was hardest against him that speaks, and in this case strict construction is hardest.

8 Ass. pl. 10. [1] So if I grant ten pounds rent to baron and feme, and if the baron die that the feme shall have three pounds rent; because these words rest ambiguous, whether I intend three pounds by way of increase or three pounds by way of restraint and abatement of the former rent of ten pounds, it shall be taken strongliest against me that am the grantor; that is, three pounds addition to the ten pounds. But if I had let lands to baron and feme for three lives reserving ten pounds per annum, and, if the baron die, *reddendo* three pounds; this shall be taken contrary to the former case, to abridge my rent only to three pounds.

14 H. 8. f. 1. pl. 1. Dy. f. 19. So if I demise *omnes boscos meos in villa de Dale* for years; this passeth the soil: but if I demise all my lands in Dale *exceptis boscis;* this extendeth to the trees only, and not to the soil.

So if I sow my land with corn, and let it for years; the corn passeth to the lessee, if I except it not: but if I make a lease for life to I. S. upon condition that upon request he shall make me a lease for years, and I. S. sow the ground, and then I make request; I. S. may well make me a lease excepting his corn, and not break the condition.

8 H. 7. f. 4, 5. 32 H. 6. f. 34. pl. 10. Dy. f. 30. So if I have free warren in my own land, and let my land for life, not mentioning the warren; yet the lessee, by implication, shall have the warren discharged and extinct during his lease: but if I let the land *una cum libera garrena*, excepting white acre; there the warren is not by implication reserved unto me either to be enjoyed or extinguished; but the lessee shall have warren against me in white acre.

29 Ass. pl. 20. So if I. S. hold of me by fealty and rent only, and I grant the rent, not speaking of the fealty; yet the fealty by implication shall pass, because my grant shall be taken strongly as of a rent service, and not of a rent secke.

44 Ed. 3. f. 19. pl. 15. Otherwise had it been if the seigniory had been by homage, fealty, and rent; because of the dignity of the service, which could not have passed by intendment by the grant of the rent.

[1] The Camb. MS omits this, and proceeds to give one example of cases of *implication*: "So in implications; if I. S. grant all his woods in such a close, it implies a liberty unto the grantee to come upon the ground and cut them down: but if I. S. lease the close excepting the woods, then himself shall have no such liberty, because he did not specially reserve it." And it omits the cases in the five following paragraphs.

But if I be seised of the manor of Dale in fee, whereof I. S. holds by fealty and rent, and I grant the manor, excepting the rent; the fealty shall pass to the grantee, and I shall have but a rent secke.

So in grants against the law: if I give land to I. S. and his heirs males, this is a good fee-simple, which is a larger estate than the words seem to intend, and the word "males" is void. But if I make a gift in tail, reserving rent to me and the heirs of my body, the words "of my body" are not void, and so to leave it a rent in fee-simple; but the words "heirs" and all are void, and leave it but a rent for life: except that you will say, it is but a limitation to any my heir in fee-simple which shall be heir of my body; for it cannot be a rent in tail by reservation.

So if I give land with my daughter in frank marriage, the remainder to I. S. and his heirs; this grant cannot be good in all parts, according to the words; for it is incident to the nature of a gift in frank marriage, that the donee hold of the donor: and therefore my deed shall be taken so strongly against myself, that, rather than the remainder shall be void, the frank marriage, though it be first placed in the deed, shall be void as a frank marriage. 43 Ed. 3. f. 13. pl. 22. [1] [34 Eliz.]

[2] But if I give land in frank marriage, reserving to me and my heirs ten pounds rent; now the frank marriage stands good, and the reservation is void, because it is a limitation of a benefit to myself, and not to a stranger. 4 H. 6. f. 22. pl. 6. 26 Ass. pl. 66.

So if I let white acre, black acre, and green acre to I. S. excepting white acre, this exception is void, because it is repugnant; but if I let the three acres aforesaid, rendering twenty shillings rent, viz. for white acre ten shillings, and for black acre ten shillings, I shall not distrain at all in green acre, but that shall be discharged of my rent.

So if I grant a rent to I. S. and his heirs out of my manor of Dale, *et obligo manerium prædictum et omnia bona et catalla mea super manerium prædictum existentia ad distringendum per ballivos domini regis:* this limitation of the distress to the king's bailiffs is void; and it is good to give a power of distress to I. S. the grantee, and his bailiffs. 46 E. 3. f. 18. pl. 17.

But if I give land in tail *tenendum de capitalibus dominis per redditum viginti solidorum et fidelitatem:* this limitation of tenure 2 Ed. 4. f. 5. pl. 11.

[1] Perhaps Webb v. Porter cited by Sir Matthew Hale in his notes on Co. Lit. 21 *a*.

[2] All these remaining cases of *grants against the law* are omitted in the Camb. MS.

to the lord is void; and it shall not be good, as in the other case, to make the reservation of twenty shillings good unto myself; but it shall be utterly void, as if no reservation at all had been made: and if the truth be that I, that am the donor, hold of the lord paramount by ten shillings only, then there shall be ten shillings only intended to be reserved upon the gift in tail as for owelty.

21 Ed. 3. f. 49. pl. 79. Dy. f. 46. So if I give land to I. S. and the heirs of his body, and for default of such issue *quod tenementum prædictum revertatur ad I. N.*; yet these words of reversion will carry a remainder to a stranger. But if I let white acre to I. S. excepting ten 35 H. 6. f. 34. shillings rent, these words of exception to mine own benefit shall never inure to words of reservation.

But now it is to be noted, that this rule is the rule which is last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other rule come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, when they encounter and cross one another in any case, that it be understood which the law holdeth worthier and to be preferred. And it is in this particular very notable to consider, that this being a rule of some strictness and rigour, doth not, as it were, his office, but in absence of other rules which are of more equity and humanity. Which rules you shall find afterwards set down with their expositions and limitations. But now to give a taste of them to this present purpose:

It is a rule, that general words shall never be stretched to a foreign intendment; which the civilians utter thus: *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem* 14 Ass. pl. 21. *rei.* Therefore, if a man grant to another common *intra metas et bundas villæ de Dale*, and part of the ville is his several, and part is his waste and common; the grantee shall not have common in the several: and yet that is the strongest exposition against the grantor.

Litt. sec. 345. So it is a rule, *Verba ita sunt intelligenda, ut res magis valeat, quam pereat.* And therefore if I give land to I. S. and his heirs, *reddendo quinque libras annuatim* to I. D. and his heirs; this implies a condition to me that am the grantor: yet it were a stronger exposition against me to say the limitation should be void, and the feoffment absolute.

So it is a rule, that the law will not intend a wrong; which the civilians utter thus: *Ea est accipienda interpretatio, quæ vitio*

caret.[1] And therefore if the executors of I. S. grant *omnia bona et catalla sua*, the goods which they have as executors will not pass, because *non constat* whether it may be a devastation, and so a wrong: and yet against a trespasser that taketh them out of their hand they shall declare *quod bona sua cepit.* 10 Ed. 4. f. 1 pl. 1.

So it is a rule, words are to be understood that they work somewhat, and be not idle and frivolous: *Verba aliquid operari debent; verba cum effectu sunt accipienda.* And therefore if I bargain and sell you four parts of my manor of Dale, and say not in how many parts to be divided; this shall be construed four parts of five, and not of six nor seven, &c. because that is strongest against me. But on the other side, it shall not be intended four parts of four parts, that is the whole, or four quarters; and yet that were strongest of all: but then the words were idle and of none effect.

So it is a rule, *Divinatio, non interpretatio est, quæ omnino recedit a litera.* And therefore if I have a fee farm-rent issuing out of white acre of ten shillings, and I reciting the same reservation do grant to I. S. the rent of five shillings *percipiend' de reddit' prædict' et de omnibus terris et tenementis meis in Dale,* with clause of distress; although there be atturnment, yet nothing passeth out of my former rent. And yet that were strongest against me, to have it a double rent or grant of part of that rent with an enlargement of a distress in the other land: but, for that it is against the words,—because *copulatio verborum inclinat acceptionem in eodem sensu,* and the word *de* (*anglicè* out of) may be taken in two senses, that is, either as a less sum out of a greater, or as a charge out of land or other principal interest; and that the coupling of it with lands and tenements doth define the sense to be one rent issuing out of another, and not as a less rent to be taken by way of computation out of a greater;—therefore nothing passeth of that rent. But if it stood of itself, without these words "lands and tenements:" *viz.* I, reciting that I am seised of such a rent of ten shillings, do grant five shillings *percipiend' de eodem reddit'* it is good enough with atturnment; because *percipiend' de etc.* may well be taken for *parcella de etc.* without violence to the words. But if it had 3 H. 6. f. 20. pl. 34

[1] The Camb. MS. here gives a different example: "So if I grant all the timber trees *crescentes super terras meas in* D., and I have lands in D. in fee simple and other lands for life, this grant shall be construed only to extend to the lands I have in fee simple: and yet the other exposition were stronger against me. And so it is of all other rules of exposition of words." And here this *Regula* ends in the MS.

been *percipiend' de* I. S. without saying *de redditibus prædict'*, although I. S. be the person that payeth me the foresaid rent of ten shillings, yet it is void. And so it is of all other rules of exposition of grants; when they meet in opposition with this rule, they are preferred.

Now to examine this rule in pleadings as we have done in grants; you shall find that in all imperfections of pleadings; whether it be in ambiguity of words and double intendments; or want of certainty and averments; or impropriety of words; or repugnancy and absurdity of words; ever the plea shall be strictly and strongly taken against him that pleads.

For ambiguity of words:

22 H. 6. f. 43. pl. 27. If in a writ of entry upon disseisin the tenant pleads jointenancy with I. S. of the gift and feoffment of I. D. judgment *de briefe*; and the demandant saith that long time before I. D. any thing had, the demandant himself was seised in fee *quousque prædict' I. D. super possessionem ejus intravit*, and made a joint feoffment, whereupon he the demandant reentered, and so was seised until by the defendant alone he was disseised; this is no plea: because the word *intravit* may be understood either of a lawful entry, or of a tortious, and the hardest against him shall be taken, which is, that it was a lawful entry: therefore he should have alleged precisely, that I. D. *disseisivit*.

Dy. f. 66. So upon ambiguity that grows by reference: if an action of debt be brought against I. N. and I. P. sheriffs of London, upon an escape, and the plaintiff doth declare upon an execution by force of a recovery in the prison of Ludgate *sub custodia* I. S. *et* I. D. then sheriffs in 1 K. H. VIII. and that he so continued *sub custodia* I. B. *et* I. G. in 2 K. H. VIII. and so continued *sub custodia* I. N. *et* I. L. in 3 K. H. VIII. and then was suffered to escape; I. N. and I. P.[1] plead, that before the escape supposed, at such a day *anno superius in narratione specificato*, the said I. B. and I. G. *ad tunc vicecomites* suffered him to escape; this is no good plea: because there be three years specified in the declaration, and it shall be hardest taken that it was 1 or 3 H. VIII. when they were out of office. And yet it is nearly induced by the *ad tunc vicecomites*, which should lead the intendment to be of that year in which the declaration supposeth that they were sheriffs; but that sufficeth not, but the year

[1] L. in MSS. It seems intended the defendants should come into office in the 4th year, and the case is so stated in Dyer.

must be alleged in fact; for it may be it was mislaid by the plaintiff, and therefore the defendants meaning to discharge themselves by a former escape, which was not in their time, must allege it precisely.

For incertainty of intendment:

If a warranty collateral be pleaded in bar, and the plaintiff by replication, to avoid the warranty, saith that he entered upon the possession of the defendant; *non constat* whether this entry was in the life of the ancestor, or after the warranty attached: and therefore it shall be taken in hardest sense, that it was after the warranty descended, if it be not otherwise averred. [26 H. 8.]

For impropriety of words:

If a man plead that his ancestor died by protestation seised, and that I. S. abated &c. this is no plea: for there can be no abatement except there be a dying seised alleged in fact; and an abatement shall not be improperly taken for disseisin in pleading, *car parols font pleas.* 39 H. 6. f. 5. pl. 6.

For repugnancy:

If a man in his avowry declare, that he was seised in his demesne as of fee of white acre, and being so seised did demise the same white acre to I. S. *habendum* the one moiety for twenty-one years from the date of the deed, the other moiety from the surrender, expiration, or determination of the estate of I. D. *qui tenet prædict' medietatem ad terminum vitæ suæ reddend'* 40s. rent: this declaration is insufficient, because the seisin that he hath alleged in himself in his demesne as of fee in the whole, and the estate for life of a moiety, are repugnant; and it shall not be cured by taking the last, which is express, to control the former, which is but general and formal; but the plea is naught: yet the matter in law had been good to have entitled him to have distrained for the whole rent. Dy. f. 256.

But the same restraint follows this rule in pleadings that was before noted in grants: for if the case be such as falleth within another rule of pleading, then this rule may not be urged.

And therefore,

It is a rule that a bar is good to a common intent, though not to every intent. As if debt be brought against five executors, and three of them make default, and two appear and plead in bar a recovery had against them two of three hundred pounds and nothing in their hands over and above that sum; if this bar should be taken strongliest against them, then it should be 9 Ed. 4. f. 12. pl. 4. Plow. f. 33. b.

intended that they might have abated the first suit, because the other three were not named, and so the recovery not duly had against them: but because of this other rule the bar is good; for that the more common intent will say, that they two did only administer, and so the action well conceived, rather than to imagine that they would have lost the benefit and advantage of abating the writ.

So there is another rule, that in pleading a man shall not disclose that which is against himself: and therefore if it be a matter that is to be set forth on the other side, then the plea shall not be taken in the hardest sense, but in the most beneficial, and to be left unto the contrary party to allege.

Dy. f. 17. And therefore, if a man be bound in an obligation, that if the feme of the obligee do decease before the Feast of St. John the Baptist which shall be in the year of our Lord God 1598[1], without issue of her body by her husband lawfully begotten then living, that then the bond shall be void; and in debt brought upon this obligation the defendant pleads that the feme died before the said feast without issue of her body then living; if this plea should be taken strongliest against the defendant, then should it be taken that the feme had issue at the time of her death, but this issue died before the feast: but that shall not be so understood, because it makes against the defendant, and it is to be brought in on the plaintiff's side, and that without traverse.

30 E. 3 f. 25. So if in detinue brought by a feme against the executors of her husband for the reasonable part of the goods of her husband [and] her demand is of a moiety, and she declares upon the custom of the realm, by which the feme is to have a moiety if there be no issue between her and her husband, and the third part if there be issue had, and declareth that her husband died without issue had between them; if this count should be hardliest construed against the party, it should be intended that her husband had issue by another wife, though not by her, in which case the feme is but to have the third part likewise; but that shall not be so intended, because it is matter of reply to be showed of the other side.

And so it is of all other rules of pleading; these being suffi-

[1] The case in Dyer is of 28 Hen. VIII. This date therefore, in which all the MSS (except the Camb. MS. which does not contain the case) and editions agree, seems to fix the date of composition of this particular paragraph as one at which Midsummer 1598 might suggest itself to Bacon while writing. See supra, p. 310. note 2.

cient, not for the exact expounding of these other rules, but *obiter* to show how this rule which we handle is put by when it meets with any other rule.

As for acts of parliament, verdicts, judgments, &c., which are not words of parties, in them this rule hath no place at all; neither in devises and wills, upon several reasons: but more especially it is to be noted, that in evidence it hath no place, which yet seems to have some affinity with pleadings, especially when demurrer is joined upon the evidence.

And, therefore, if land be given by will by H. C. to his son I. C. and the heirs males of his body begotten; the remainder to F. C. and the heirs males of his body begotten; the remainder to the heirs males of the body of the devisor; the remainder to his daughter S. C. and the heirs of her body, with a clause of perpetuity; and the question comes upon the point of forfeiture in an assize taken by default, and evidence is given, and demurrer upon evidence; and in the evidence given to maintain the entry of the daughter upon a forfeiture, it is not set forth nor averred that the devisor had no other issue male; yet the evidence is good enough, and it shall be so intended. Plow. f. 412.

And the reason thereof cannot be, because a jury may take knowledge of matters not within the evidence, and the court contrariwise cannot take knowledge of any matter not within the pleas: for it is clear that if the evidence had been altogether remote and not proving the issue, there, although the jury might find it, yet a demurrer might well be taken upon the evidence. But I take the reason of difference to be, between pleadings, which are but openings of the case, and evidences, which are the proofs of an issue: for pleadings, being but to open the verity of the matter in fact indifferently on both parts, have no scope and conclusion to direct the construction and intendment of them, and therefore must be certain; but in evidence and proofs the issue, which is the state of the question and conclusion, shall incline and apply all the proofs as tending to that conclusion. Another reason is, that pleadings must be certain, because the adverse party may know whereto to answer, or else he were at a mischief; which mischief is remedied by demurrer: but in evidence, if it be short, impertinent, or uncertain, the adverse party is at no mischief, because it is to be thought the jury will pass against him: yet, nevertheless, because the jury is not compellable to supply the defect of evidence out of their own know-

ledge, though it be in their liberty so to do, therefore the law alloweth a demurrer upon evidence also.

REGULA IV.[1]

Quod sub certa forma concessum vel reservatum est non trahitur ad valorem vel compensationem.

THE law permitteth every man to part with his own interest, and to qualify his own grant, as it pleaseth himself; and therefore doth not admit any allowance or recompense, if the thing be not taken as it is granted.

So in all profits *a prendre*:

27 H. 6. f. 10. pl. 5. If I grant common for ten beasts, or ten loads of wood out of my coppice, or ten loads of hay out of my meads, to be taken for three years; he shall not have common for thirty beasts, or thirty loads of wood or hay, the third year, if he forbear for the space of two years. Here the time is certain and precise.

So if the place be limited; as if I grant estovers to be spent in such a house, or stone towards the reparation of such a castle; although the grantee do burn of his fuel and repair of his own charge, yet he can demand no allowance for that he took not.

So if the kind be specified; as if I let my park reserving to myself all the deer and sufficient pasture for them; if I do decay the game, whereby there is no deer, I shall not have quantity of pasture answerable to the feed of so many deer as were upon the ground when I let it, but am without any remedy, except I will replenish the ground again with deer.

But it may be thought that the reason of these cases is the default and laches of the grantee, which is not so.

For put the case that the house where the estovers should be spent be overthrown by the act of God, as by tempest, or burnt by the enemies of the king; yet there is no recompense to be made.

And in the strongest case, where it is [in][2] default of the grantor; yet he shall make void his own grant rather than the certain form of it should be wrested to an equity or valuation.

9 H. 6. f. 35, 36. pl. 8. As if I grant common *ubicunque averia mea ierint*, the commoner cannot otherwise entitle himself, except that he aver that

[1] Omitted in Camb. MS.

[2] Qu. the.

in such grounds my beasts have gone and fed; and if I never put in any, but occupy my grounds otherwise, he is without remedy: but if I once put in, and after by poverty or otherwise desist, yet the commoner may continue: contrariwise, if the words of the grant had been *quandocunque averia mea ierint*, for there it depends continually upon the putting in of my beasts, or at least the general seasons when I put them in; not upon every hour or moment.

So if I grant *tertiam advocationem* to I. S. if he neglect to take his turn *ea vice*, he is without remedy: but if my wife be before entitled to dower, and I die, then my heir shall have two presentments, and my wife the third, and my grantee shall have the fourth; and it doth not impugn this rule at all, because the grant shall receive that construction at the first, that it was intended such an avoidance as may be taken and enjoyed: as if I grant *proximam advocationem* to I. D. and then grant *proximam advocationem* to I. S. this shall be intended the next to the next, that is the next which I may lawfully grant or dispose. Dy. f. 35.

But if I grant *proximam advocationem* to I. S. and I. N. is incumbent, and I grant by precise words, *illam advocationem, quam post mortem, resignationem, translationem, vel deprivationem I. N. immediate fore contigerit;* now this grant is merely void; because I had granted that before, and it cannot be taken against the words.

REGULA V.

Necessitas inducit privilegium quoad jura privata.

THE law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election: and therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself. Plow. f. 9.

Necessity is of three sorts: necessity of conservation of life; necessity of obedience; and necessity of the act of God, or a stranger.

First, for conservation of life:

If a man steal viands to satisfy his present hunger, this is no felony nor larceny. Stamf.

So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

Plow. f. 13. b. per Brooke. 15 H. 7. f. 2. pl. 2. per Keble. 11 H. 7. f. 29. 30 per Read.

So if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth; this is no escape, nor breaking of prison.

Reniger v. Fogassa, Plow. f. 1.

So upon the statute, that every merchant that setteth his merchandise on land without satisfying the customer or agreeing for it, (which agreement is construed to be in certainty,) shall forfeit his merchandise; and it is so that by tempest a great quantity of the merchandise is cast overboard, whereby the merchant agrees with the customer by estimation, which falleth out short of the truth; yet the over quantity is not forfeited, by reason of the necessity: where note, that necessity dispenseth with the direct letter of a statute law.

Lit. sec. 419. 12 H. 4. f. 20. pl. 5. 14 H. 4. f. 13. pl. 2. 38 H. 6. f. 11. pl. 22. 28 H. 6. f. 8. pl. 8. 39 H. 6. f. 50. pl. 16.

So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial to him as an entry. So shall a man save his default of appearance by *cretine*[1] *d'eau*, and avoid his debt by *duresse*, whereof you shall find proper cases elsewhere.

Stamf. 26. 2 Ed. 3. Fitz. Tit. Coron. pl. 160.

The second necessity is of obedience: and therefore, where baron and feme commit a felony, the feme can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes to her husband.

So one reason among others why ambassadors are used to be excused of practices against the state where they reside, except it be in point of conspiracy, (which is against the law of nations and society,) is, because *non constat* whether they have it in *mandatis*, and then they are excused by necessity of obedience.

So if a warrant or precept come from the king to fell wood upon the ground whereof I am tenant for life or for years, I am excused in waste.

43 Ed. 3. f. 6. 19 Ed. 3. 32 Ed. 3. 44 Ed. 3. f. 21. Fitz. Tit. Waste pl. 74. 30. 105. 78.

The third necessity is of the act of God, or of a stranger: as if I be particular tenant for years of a house, and it be overthrown by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging unto it some cottages which have been infected, whereby I can

[1] This word, like most in law French, seems spelt anyhow. It means floods, and I suppose comes from *cresco*.

procure none to inhabit them, nor any workmen to repair them, and so they fall down: in all these cases I am excused in waste. But of this last learning, when and how the act of God and strangers do excuse, there be other particular rules.

But then it is to be noted, that necessity privilegeth only *quoad jura privata;* for in all cases, if the act that should deliver a man out of the necessity[1] be against the commonwealth, necessity excuseth not: for *privilegium non valet contra rempublicam;* and, as another saith, *necessitas publica major est quam privata:* for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject that he prefer the urgent service of his prince and country before the safety of his life. As if in danger of tempest those that are in the ship throw overboard other men's goods, they are not answerable; but if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot for any danger of tempest justify the throwing them overboard: for there it holdeth which was spoken by the Roman, when they alleged the same necessity of weather to hold him from embarking, *necesse est ut eam, non ut vivam.* So in the case put before of husband and wife; if they join in committing treason, the necessity of obedience doth not excuse the offence as it doth in felony, because it is against the commonwealth.

So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house, in a city or town, and be distressed, and to save my life I set fire on mine own house, which spreadeth and taketh hold on the other houses adjoining; this is not justifiable, but I am subject to their action upon the case, because I cannot rescue mine own life by doing anything against the commonwealth. But if it had been but a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued, for the safeguard of my life, it is justifiable. 13 H. 8. f. 16. per Shelly.

This rule admitteth an exception, when the law intendeth some fault or wrong in the party that hath brought himself into the necessity, so that it is *necessitas culpabilis.* This I take to be chief reason why *seipsum defendendo* is not matter of justification: because the law intends it hath a commencement upon an unlawful cause, because quarrels are not presumed to grow

[1] *i. e.* I suppose, *ex necessitate.*

4 H. 7. f. 2. pl. 3. Stamford, f. 15.

without some wrongs either in words or deeds on either part; and the law, thinking it a thing hardly triable in whose default the affray or quarrel began, supposeth the party that kills another in his own defence not to be without malice; and therefore, as it doth not touch him in the highest degree, so it putteth him to sue out his pardon of course, and punisheth him by forfeiture of goods: for where there can be no malice nor wrong presumed, as where a man assails me to rob me, and I kill him that assaileth me, or if a woman kill him that assaileth her to ravish her, it is justifiable without any pardon.

Stamf. f. 16.

So the common case proveth this exception; that is, if a madman commit a felony, he shall not lose his life for it, because his infirmity came by the act of God; but if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default. For[1] the reason of loss and deprivation of will and election by necessity and by infirmity is all one; for the lack of *arbitrium solutum* is the matter: and therefore as *infirmitas culpabilis* excuseth not, no more doth *necessitas culpabilis.*

REGULA VI.

Corporalis injuria non recipit æstimationem de futuro.[2]

THE law, in many cases that concern lands or goods, doth deprive a man of his present remedy and turneth him over to some further circuit of remedy, rather than to suffer an inconvenience: but if it be question of personal pain, the law will not compel him to sustain it and expect remedy; because it holdeth no damages a sufficient recompense for a wrong which is corporal.

As if the sheriff make a false return that I am summoned, whereby I lose my land; yet, because of the inconvenience of drawing all things to incertainty and delay if the sheriff's return should not be credited, I am excluded of my averment against it, and am put to mine action of deceit against the sheriff and summoners: but if the sheriff upon a *capias* return *cepi corpus, et quod est languidus in prisona,* there I may come in and falsify the return of the sheriff to save my imprisonment.

Long 5° Ed. 4. f. 93, 94, &c.

8 H. 6. f. 8. pl. 8.

So if a man menace me in my goods, as that he will burn

[1] Omitted in Camb. MS.

[2] The words *de futuro* are omitted in the Camb. MS. as is the contrast with the *lex talionis* applied *de præterito,* in the last paragraph of the rule.

certain evidences of my land which he hath in his hand, if I will not make unto him a bond; yet if I enter into bond by this terror, I cannot avoid it by plea, because the law holdeth it an inconvenience to avoid a specialty by such matter of averment; and therefore I am put to mine action against such a menacer: but if he restrain my person, or threaten me with battery, or with burning my house which is a safety and protection to my person, or with burning an instrument of manumission which is evidence of my enfranchisement; if upon such menace or duresse I make a deed, I shall avoid it by plea. 7 Ed. 4. f. 21. pl. 24.

So if a trespasser drive away my beasts over another's ground and I pursue them to rescue them, yet am I trespasser to the stranger upon whose ground I come: but if a man assail my person, and I fly over another's ground, now am I no trespasser.

This ground some of the canonists do aptly infer out of the saying of Christ: *Annon est corpus supra vestimentum?* where they say *vestimentum* comprehendeth all outward things appertaining to a man's condition, as lands and goods, which, they say, are not in the same degree with that which is corporal; and [1] this was the reason of the ancient *lex talionis; oculus pro oculo, dens pro dente:* so that by that law *corporalis injuria de præterito non recipit æstimationem:* but our law, when the injury is already executed and inflicted, thinketh it best satisfaction to the party grieved to relieve him in damages, and to give him rather profit than revenge; but it will never force a man to tolerate a corporal hurt, and to depend upon that inferior kind of satisfaction, *ut in damagiis.*

REGULA VII.

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.

In capital causes, *in favorem vitæ,* the law will not punish in so high a degree, except the malice of the will and intention do appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrong-doer.

[1] The Camb. MS. has only:
"But when the injury is already executed and inflicted, the law can do no more but relieve a man in damages; but it will never force him to tolerate a corporal hurt, and to depend upon that inferior kind of satisfaction."

And therefore the law makes a difference between killing a man upon malice forethought, and upon a present heat: but if I give a man slanderous words, whereby I damnify him in his name and credit, it is not material whether I use them upon sudden choler and provocation or of set malice; but in an action upon the case I shall render damages alike.

Stamf. 16. 6 E. 4. f. 7. pl. 18.

[1] So if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course: but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the same as deeply as if he had done it of malice.

Stamf. 16 b.

So if a surgeon authorised to practice do, through negligence in his cure, cause the party to die, the surgeon shall not be brought in question of his life; and yet if he do only hurt the wound, whereby the cure is cast back, and death ensues not, he is subject to an action upon the case for his misfeasance.

So if baron and feme be, and they commit felony together, the feme is neither principal nor accessory, in regard of her obedience to the will of her husband: but if baron and feme join in committing a trespass upon land or otherwise, the action may be brought against them both.

3 H. 7. f. 1. pl. 4. Stamf. 16 b. 35 H. 6. f. 11. pl. 18.

So [2] if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof: but if he put out a man's eye, or do him like corporal hurt, he shall be punished in trespass.

So in felonies the law admitteth the difference of principal and accessory; and if the principal die, or be pardoned, the proceeding against the accessory faileth: but in trespass, if one command his man to beat you, and the servant after the battery die, yet your action of trespass stands good against the master.

Plow. f. 98.

REGULA VIII.

Æstimatio præteriti delicti ex post facto nunquam crescit.

THE law construeth neither penal laws nor penal facts by intendments, but considereth the offence in degree as it standeth at the time when it is committed; so as if any circumstance or matter be subsequent, which laid together with the beginning

[1] Omitted in Camb. MS.
[2] The rest of the rule is omitted in the Camb. MS.

should seem to draw to it a higher nature, yet the law doth not extend or amplify the offence.

Therefore if a man be wounded, and the percussor is voluntarily let go at large by the gaoler, and after death ensueth of the hurt; yet this is no felonious escape in the gaoler. 11 H. 4. f. 12. pl. 26.

So if the villain strike mortally the heir apparent of the lord, and the lord dieth before, and the person hurt who succeedeth to be lord to the villain dieth after; yet this is no petty treason.

So if a man compass and imagine the death of one that after cometh to be king of the land, not being any person mentioned within the statute of 25 Ed. III., this imagination precedent is not high treason.

So if a man usé slanderous speeches of a person to whom some dignity after descends that maketh him a peer of the realm; yet he shall have but a simple action of the case, and not in the nature of *scandalum magnatum* upon the statute.

[1] So if John Stile steal sixpence from me in money, and the Queen by her proclamation doth raise monies, that the weight of silver in the piece now of sixpence should go for twelve pence; yet this shall remain petty larceny, and no felony: and yet in all civil reckonings the alteration shall take place; as if I contract with a labourer to do some work for twelve pence, and the enhancing of money cometh before I pay him, I shall satisfy my contract with a sixpenny piece so raised.

So if a man deliver goods to one to keep, and after retain the same person into his service, who afterwards goeth away with his goods; this is no felony by the statute of 21 H. VIII., because he was not servant at that time. [28 H. 8. pl. 2.]

[2] In like manner, if I deliver goods to the servant of I. S. to keep, and after die and make I. S. my executor; and, before any new commandment or notice of I. S. to his servant for the custody of the same goods, his servant goeth away with them; this is also out of the same statute.

But note that it is said *præteriti delicti:* for any accessory before the fact is subject to all the contingencies pregnant of the fact, if they be pursuances of the same fact; as if a man command or counsel one to rob a man or beat him grievously, and murder ensue; in either case he is accessory to the murder, *quia in criminalibus præstantur accidentia.* Plow. f. 475.

[1] Omitted in Camb. MS.

[2] Omitted in Camb. MS.

REGULA IX.

Quod remedio destituitur ipsa re valet, si culpa absit.[1]

THE benignity of the law is such as, when to preserve the principles and grounds of law it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse: for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own; sometimes it will give him a more beneficial remedy.

Lit. sec. 683. [2] And therefore if the heir of the disseisor which is in by descent make a lease for life, the remainder for life unto the disseisee, and the lessee for life die; now the frank tenement is cast upon the disseisee by act in law, and thereby he is disabled to bring his *præcipe* to recover his right; whereupon the law judgeth him in of his ancient right as strongly as if it had been recovered and executed by action; which operation of law is by an ancient term and word of law called a *remitter*.

But if there may be assigned any default or laches in him, either in accepting the freehold or in accepting the interest that draws the freehold, then the law denieth him any such benefit.

And therefore if the heir of the disseisor make a lease for years, the remainder in fee to the disseisee; the disseisee is not remitted: and yet the remainder is in him without his own knowledge or assent; but, because the freehold is not cast upon him by act in law, no remitter.[3]

So if the heir of the disseisor infeoff the disseisee and a stranger,
Lit. sec. 685. and make livery to the stranger; although the stranger die before any agreement or taking of the profits by the disseisee, yet he is not remitted: because though a moiety be cast upon

[1] The Camb. MS. has: "*cui actio per legem citra culpam suam eripitur, ei benignitas legis largitur rem ipsam.*" Harl. MS. 6688. gives both forms of the maxims.

[2] The Camb. MS. omits all the cases of *remitter*, and the other cases down to that of the rent charge upon condition, and only has the observation: "This is the reason of a Remitter, because the law taketh away the action and suit which cannot be held against the party himself, and therefore the law without circumstance of recovery putteth him in of hisbest right."

[3] The earliest edition has a *Quod nota*, and two of the best MS. leave out at the commencement the words, "the heir of;" all of which seems to point to some contemporary doubt about the position here maintained. I am not aware of any distinct authority for it, but it seems implied in Coke's reasoning on Litt. sec. 681., and of Littleton in sec. 682. The disseisee may disagree and it is his own laches to accept. The next marginal reference to Littleton I have retained, because, though it does not lay down Bacon's position, he may well have drawn the inference thence.

him by survivor, yet that is but *jus accrescendi*, and it is no casting of the freehold upon him by act in law, but he is still as an immediate purchaser; and therefore no remitter.

So if the husband be seised in the right of his wife, and discontinue and dieth, and the feme takes another husband, who takes a feoffment from the discontinuee to him and his wife; the feme is not remitted: and the reason is, because she was once sole, and so a laches in her for not pursuing her right.[1] But if the feoffment taken back had been to the first husband and herself, she had been remitted. Lit. sec. 666

Yet if the husband discontinue the lands of the wife, and the discontinuee make a feoffment to the use of the husband and wife, she is not remitted; but that is upon a special reason, upon the letter of the statute of 27 H. VIII. of uses, that willeth that the *cestuy que use* shall have the possession in quality, form, and degree, as he had the use. But that holdeth place only upon the first vester of the use: for when the use is once absolutely executed and vested, then it doth insue merely the nature of possessions; and if the discontinuee had made a feoffment in fee to the use of I. S. for life, the remainder to the use of baron and feme, and lessee for life die; now the feme is remitted, *causa qua supra*. Plow. f. 111. Br. Tit. Remitter, pl. 49. Dy. f. 54.

Also if the heir of the disseisor make a lease for life, the remainder to the disseisee, who chargeth the remainder, and lessee for life dies; the disseisee is not remitted: and the reason is, his intermeddling with the wrongful remainder, whereby he hath affirmed the same to be in him, and so accepted it. But if the heir of the disseisor had granted a rent charge to the disseisee, and afterwards made a lease for life, the remainder to the disseisee, and lessee for life had died, the disseisee had been remitted; because there appeareth no assent or acceptance of any estate in the freehold, but only of a collateral charge.

So if the feme be disseised, and intermarry with the disseisor, who makes a lease for life, rendering rent, and dieth leaving a son by the same feme, and the son accepts the rent of lessee for life, and then the feme dies, and the lessee for life dies; the son is not remitted: yet the frank tenement was cast upon him by act in law; but because he had agreed to [6 Ed. 3. f. 17. pl. 27.] Dy. f. 30. pl. 207.

[1] A note in the first edition denies this to be law, agreeing with Coke in his note on Litt. sec. 671.

be in of the tortious reversion by acceptance of the rent, therefore no remitter.

So if tenant in tail discontinue, and the discontinuee make a lease for life, the remainder to the issue in tail being within age, and at full age the lessee for life surrendereth to the issue in tail, and tenant in tail die, and lessee for life die; yet the issue is not remitted: and yet if the issue had accepted a feoffment within age, and had continued the taking of the profits when he came of full age, and then the tenant in tail had died; notwithstanding his taking of the profits, he had been remitted. For that which guides the remitter is, if he be once in of the freehold without any laches: as if the heir of the disseisor enfeoffs the heir of the disseisee, who dies, and it descends to a second heir, upon whom the frank tenement is cast by descent, who enters and takes the profits, and then the disseisee dies; this is a remitter, *causa qua supra.*

Also if tenant in tail discontinue for life, and take a surrender of the lessee, now he is remitted and seised again by force of the tail; and yet he cometh in by his own act: but
Lit. sec. 696. this case differeth from all the other cases; because the discontinuance was but particular at first, and the new gained reversion is but by intendment and necessity of law, and, therefore, is knit, as it were *ab initio*, with a limitation to determine, whensoever the particular discontinuance endeth and the estate cometh back to the ancient right.

To proceed from cases of remitter, which is a great branch of this rule, to other cases:

If executors do redeem goods pledged by their testator with their own money, the law doth convert so much goods as doth amount to the value of that they lay forth to themselves in
Dy. f. 2. property; and upon a plea of fully administered it shall be allowed: and the reason is, because it may be matter of necessity for the well administering of the goods of the testator and executing of their trust, that they disburse money of their own; for else perhaps the goods would have been forfeited, and he that had them in pledge would not accept other goods but money: and so it is a liberty which the law gives them; and then they can have no suit against themselves; and therefore the law gives them leave to retain so much goods by way of allowance.

And if there be two executors, and one of them pay the

money; he may likewise retain against his companion, if he have notice thereof. But if there be an overplus of goods, above the value of that he hath disbursed, then ought he by his claim to determine which goods he doth elect to have in value; or else before such election if his companion do sell all the goods, he hath no remedy but in the spiritual court: for to say he should be tenant in common with himself and his companion *pro rata* of that he doth lay out, the law doth reject that course for intricateness. Dy. f. 167.

So if I. S. have a lease for years worth twenty pounds by the year, and grant unto I. D. a rent of ten pounds a year, and after make him his executor; now I. D. shall be charged with assets ten pounds only, and the other ten pounds shall be allowed and considered to him: and the reason is, because the not refusing shall be accounted no laches to him, because an executorship is *pium officium*, and matter of conscience and trust, and not like a purchase to a man's own use. [29 H. 8. pl. 7. in fine.]

Like law is, where the debtor makes the debtee his executor; the debt shall be considered in the assets, notwithstanding it be a thing in action. 13 H. 4. f. 21. Plow. f. 185.

So if I have a rent charge, and grant it upon condition; now, though the condition be broken, the grantee's estate is not defeated till I have made my claim: but if after any such grant my father purchase the land, and it descend to me; now, if the condition be broken, the rent ceaseth without claim.[1] But if I had purchased the land myself, then I had extincted mine own condition, because I had disabled myself to make my claim. And yet a condition collateral is not suspended by taking back estate; as if I make a feoffment in fee, upon condition that I. S. shall marry my daughter, and take a lease for life from my feoffee; if the feoffee break the condition I may claim to hold in by my fee-simple: but the case of the charge is otherwise; for if I have a rent charge issuing out of twenty acres, and grant that rent over upon condition, and purchase but one acre, the whole condition is extinct, and the possibility of the rent by the condition as fully destroyed as if the rent had been in me in *esse*. Plow. f. 133 b. [35 H 6.]

So if the King grant to me the wardship of the heir of I. S. when it falleth; because an action of covenant lieth not against the King, I shall have the thing itself in interest. But[2] if I let Fitz. Tit. Grant 91.

[1] The rest of this paragraph is omitted in the Camb. MS.
[2] Omitted in Camb. MS.

land to I. S. rendering a rent, with condition of re-entry, and I. S. be attainted, whereby the lease comes to the King; now my demand upon the land is gone which should give me benefit of re-entry, and yet I shall not have it reduced without demand: and the reason of difference is, because my condition in this case is not taken away in right, but only suspended by the privilege of the person: for if the King grant the lease over, the condition is revived as it was.

So if my tenant for life grant his estate to the King; now if I will grant my reversion over, the King is not compellable to atturn; therefore it shall pass by grant by deed without atturnment.

[9 Ed. 2.] So if my tenant for life be, and I grant my reversion *pur autre vie*, and the grantee die living *cestui que vie;* now the privity between tenant for life and me is not restored, and I have no tenant in *esse* to atturn; therefore I may pass my reversion without atturnment.

Dy. f. 48. pl. 17. So if I have a nomination to a church, and another hath the presentation, and the presentation comes to the King; now because the King cannot be attendant, my nomination is turned to an absolute patronage.

See 7 Rep. 8 a. So if a man be seised of an advowson, and take a wife, and after title of dower given he join in impropriating the church, and dieth; now because the feme cannot have the third turn because of the perpetual incumbency, she shall have all the turns during her life: for [1] it shall not be disimpropriated to the benefit of the heir contrary to the grant of tenant in fee-simple.

But if a man grant the third presentment to I. S. and his heirs, and impropriate the advowson; now the grantee is without remedy, for he took his grant subject to that mischief at the first: and, therefore it was his laches, and therefore not like the case of the dower. And this grant of the third avoidance is not like *tertia pars advocationis*, or *medietas advocationis*, upon a tenancy in common of the advowson: for if two tenants in common be, and an usurpation be had against them, and the usurper do impropriate, and one of the tenants in common do release, and the other bring his writ of right *de medietate advocationis*, and recover; now I take the law to be that, because tenants in common ought to join in presentments,

[1] This explanation is omitted in Camb. MS.: as is the whole of the next case.

which cannot now be, he shall have the whole patronage. For neither can there be an apportionment, that he should present all the turns and his incumbent but to have a moiety of the profits, nor yet the act of impropriation shall not be defeated: but as, if two tenants in common be of a ward, and they join in a writ of right of ward, and one release, the other shall recover the entire ward, because it cannot be divided; so shall it be in the other case, though it be of inheritance, and though he bring his action alone. 45 Ed. 3. f. 10. pl. 2.

Also if a disseisor be disseised, and the first disseisee release to the second disseisor upon condition, and a descent be cast, and the condition broken; now the mesne disseisor, whose right is revived, shall enter notwithstanding this descent, because his right was taken away by the act of a stranger.

But[1] if I. S. devise land by the statute of 32 H. VIII. and the heir of the devisor enters and makes a feoffment in fee, and feoffee dieth seised; this descent bindeth, and there shall not be a perpetual liberty of entry upon the reason that he never had seisin whereupon he might ground his action; but he is at a mischief by his own laches. And the like law of the Queen's patentee: for I see no reasonable difference between them and him in the remainder, which is Littleton's case.

But note, that the law by operation and matter in fact will never countervail and supply a title grounded upon a matter of record; and therefore if I be entitled unto a writ of error, and the land descend unto me, I shall never be remitted; no more shall I be unto an attaint, except I may also have a writ of right.

So if upon my avowry for services my tenant disclaim, where I may have a writ of right as upon disclaimer; if the land after descend to me, I shall never be remitted. Dy. f. 5. pl. 1.

[1] In the Camb. MS. these cases of the devisee and patentee are introduced at the end of the Rule, with the introductory observation: "Note also, if it be not *citra culpam suam*, but that there be laches in the party, then the law useth no such indulgence to him." As to the point, see Co. Litt. 240 *b.*, and Butler's note.

UNIVERSITY

REGULA X.[1]

Verba generalia restringuntur ad habilitatem rei vel personæ.

It is a rule that the King's grants shall not be taken or construed to a special intent; it is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or a repugnant intent: for all words, whether they be in deeds or statutes or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter and the person.

Perk. pl. 108. As if I grant common *in omnibus terris meis* in D. and I have in D. both open grounds and several; it shall not be stretched to common in my several, much less in my garden or orchard.

14 H. 8. f. 2. pl. 1. So if I grant to a man *omnes arbores meas crescentes supra terras meas in* D. he shall not have apple-trees nor other fruit-trees growing in my gardens or orchards, if there be any other trees upon my grounds.

41 Ed. 3. f. 6. 19. pl. 14. 3. So if I grant to I. S. an annuity of ten pounds a year *pro consilio impenso et impendendo;* if I. S. be a physician, it shall be understood of his counsel in physic; and if he be a lawyer, of his counsel in law.

So if I do let a tenement to I. S. near by my dwelling-house in a borough, provided that he shall not erect or use any shop in the same without my license, and afterwards I license him to erect a shop, and I. S. is then a milliner; he shall not, by virtue of these general words, erect a joiner's shop.

Dy. f. 337. pl. 36. So the statute of chantries, that willeth all lands to be forfeited that were given or employed to a superstitious use, shall not be construed of the glebe lands of parsonages: nay farther, if lands be given to the parson and his successors of D. to say a mass in his church of D. this is out of the statute, because it shall be intended but as augmentation of his glebe: but otherwise had it been, if it had been to say a mass in another church than his own.

Stat. Westm. 1. cap. 4. So the statute of wrecks, that willeth that goods wrecked, where any live domestical creature remains in the vessel, shall be preserved and kept to the use of the owner that shall make

[1] Omitted in Camb. MS.

his claim by the space of one year, doth not extend to fresh victuals or the like, which is impossible to keep without perishing or destroying it: for in these and the like cases general words may be taken, as was said, to a rare or foreign intent, but never to an unreasonable intent.

REGULA XI.

Jura sanguinis nullo jure civili dirimi possunt.

THEY be the very words of the civil law, which cannot be amended.

To explain this rule: *Hæres est nomen juris, filius est nomen naturæ;* therefore corruption of blood taketh away the privity of the one, that is of the heir, but not of other, that is of the son: therefore if a man be attainted and be murdered by a stranger the eldest son shall not have appeal, because the appeal is given to the heir; for the youngest sons who are equal in blood shall not have it: but if an attainted person be killed by his son, this is petty treason, for that the privity of a son remaineth. For[1] I admit the law to be that if the son kill his father or mother it is petty treason, and that there remaineth in our laws so much of the ancient footsteps of *potestas patria* and natural obedience; which by the law of God is the very instance itself, and all other government and obedience is taken but by equity: which I add because some have sought to weaken the law in that point.

35 H. 6. f. 57, 58.

Lamb. Jus. f. 245.

So if land descend to the eldest son of a person attainted from an ancestor of the mother held in knight's service, the guardian shall enter, and oust the father; because the law giveth the father that prerogative in respect he is his son and heir; for of a daughter or a special heir in tail he shall not have it: but if the son be attainted, and the father covenant in consideration of natural love to stand seised of land to his use, this is good enough to raise an use; because the privity of natural affection remaineth.

F. N. Br. fo. 147. L. O. R.

So if a man be attainted, and have charter of pardon, and be returned of a jury between his son and I. S. the challenge remaineth: so may he maintain any suit of his son, notwithstanding the blood be corrupted.

[1] This paragraph is not in Camb. MS.

So[1] by the statute of 21 H. VIII. c. 5. the ordinary ought to commit the administration of his goods, that was attainted and purchased his charter of pardon, to his children though born before the pardon: for it is no question of inheritance; for if one brother of the half blood die, the administration ought to be committed to the other brother of the half blood, if there be no nearer by the father.

Bro. Tit. Adm. pl. 47.

So if the uncle by the mother be attainted, and pardoned, and land descend from the father to the son within age held in socage, the uncle shall be guardian in socage: for that savoureth so little of the privity of heir, as the possibility to inherit shutteth out.

But if a feme tenant in tail assent to the ravisher, and have no issue, and her cousin is attainted, and pardoned, and purchaseth the reversion, he shall not enter for a forfeiture: for though the law giveth it not in point of inheritance, but only as a perquisite to any of the blood, so he be next in estate, yet the recompense is understood for the stain of his blood, which cannot be considered when it is once wholly corrupted before.

So if a villain be attainted, yet the lord shall have the issues of his villain born before or after the attainder; for the lord hath them *jure naturæ* but as the increase of a flock.

Fitz. N. B. f. 82. [Register, fol. 87.]

Query, Whether, if the eldest son be attainted and pardoned, the lord shall have aid of his tenants to make him knight? And it seemeth he shall; for the words of the writ are *filium primogenitum*, and not *filium et hæredem*; and the like writ lieth *pur file marrier*, who is no heir.

REGULA XII.

Receditur à placitis juris potius quàm injuriæ et delicta maneant impunita.

The law hath many grounds and positive learnings, which are[2] not of the maxims and conclusions of reason, but yet are learnings received, which the law hath set down and will not have called in question: these may be rather called *placita juris* than *regulæ juris*. With such maxims the law will dispense, rather

[1] This and the two following cases are omitted in Camb. MS.

[2] The Camb. MS. has: "not of the highest rules of reason, which are *leyum leges*, such as we have here collected."

than crimes and wrongs should be unpunished; *quia salus populi suprema lex*, and *salus populi* is contained in the repressing offences by punishment.

Therefore if an advowson be granted to two and the heirs of one of them, and an usurpation be had, they both shall join in a writ of right of advowson; and yet it is a ground in law, that a writ of right lieth of no less estate than of a fee-simple: but because the tenant for life hath no other several action in the law given him; and also that the jointure is not broken, and so the tenant in fee-simple cannot bring his writ of right alone; therefore rather than he shall be deprived wholly of remedy, and this wrong unpunished, he shall join his companion with him, notwithstanding the feebleness of his estate. Fitz. N. B. 30. B. F.

But if lands be given to two and to the heirs of one of them, and they lease in a *præcipe* by default; now they shall not join in a writ of right, because the tenant for life hath a several action, namely, a *Quod ei deforciat*, in which respect the jointure is broken. 6 Ed. 3. f. 21.

So if tenant for life and his lessor join in a lease for years, and the lessee commit waste, they shall join in punishing this waste, and *locus vastatus* shall go to the tenant for life and the damages to him in the reversion; and yet an action of waste lieth not for tenant for life: but because he in the reversion cannot have it alone, because of the mesne estate for life, therefore rather than the waste shall be unpunished, they shall join. 27 H. 8. f. 13. pl. 36.

So [1] if two coparceners be, and they lease the land, and [2] the lessee commit waste, and one of them die, and hath issue; the aunt and the issue shall join in punishing this waste, and the issue shall recover the moiety of the place wasted, and the aunt the other moiety and the entire damages: and yet *actio injuriarum moritur cum persona;* but *in favorabilibus magis attenditur quod prodest, quàm quod nocet.*

So if a man recovers by erroneous judgment, and hath issue two daughters, and one of them is attainted; the writ of error shall be brought against both parceners notwithstanding the privity fail in the one. 20 Ed. 2. Fits. Tit. Descent, pl. 16.

Also it is a positive ground, that the accessory in felony cannot be proceeded against until the principal be tried; yet if [33 Eliz.]

[1] This and the following case are omitted in the Camb. MS.

[2] I have transposed these words, which in all the editions and MSS. I have seen stand after "and hath issue;" the sense and the authorities require the change. Fitz. N. B. fo. 60. R.

a man upon subtlety and malice set a madman by some device upon another to kill him, and he doth so; now forasmuch as the madman is excused, because he can have no will nor malice, the law accounteth the inciter as principal, though he be absent, rather than the crime shall go unpunished.

Fitz. Tit. Corone, pl. 459. Stamf. f. 60.

So [1] it is a ground in the law, that the appeal of murder goeth not to the heir where the party murdered hath a wife, nor to the younger brother where there is an elder; yet if the wife murder her husband, because she is the party offender the appeal leaps over to the heir; and so if the son and heir murder his father, it goeth to the second brother.

But if the rule be one of the higher sort of maxims, that are *regulæ rationales* and not *positivæ*, then the law will rather endure a particular offence to escape without punishment than violate such a rule.

Stamf. cap. 12. f. 125.

As [2] it is a rule that penal statutes shall not be taken by equity, and the statute of 1 Ed. VI. cap. 12 enacts that those that are attainted for stealing of horses shall not have their clergy, the judges conceived that this did not extend to him that stole but one horse, and therefore procured a new act for it, 2 Ed. VI. cap. 33. And they had reason for it, as I take the law. For it is not like the case upon the statute of Glocest. that gives an action of waste against him that holds *pro termino vitæ vel annorum*. It is true, if a man hold but for a year he is within the statute. For it is to be noted, that penal statutes are taken strictly and literally only in the point of defining and setting down the fact and the punishment, and in those clauses that concern them, and not generally in words that are but circumstances and conveyance in the putting of the case. And so see the diversity; for if the law be, that for such an offence a man shall lose his right hand, and the offender hath had his right hand cut off in the wars before, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended. But if the statute of 1 Ed. VI. had been, that he that should steal a horse should be ousted of his clergy, then there had been

Plow. f. 467. Litt. sec. 67. 46 Ed. 3. f. 31. pl. 32.

[1] Omitted in Camb. MS.

[2] For all this paragraph the Camb. MS. has: "Therefore, whereas it is a rule that the penal statutes shall not be taken by equity, if the law be that, for such an offence, a man shall lose his right hand" (and so on as in the text to "extended"): and then adds: "So it is very usual in penal statutes, which have sometimes omitted cases more heinous in the same kind than they have provision for, and yet it hath been requisite to make new statutes and not to exceed the letter of the old.

no question at all but, if a man had stolen more horses than one, he had been within the statute; *quia omne majus continet in se minus.*

REGULA XIII.[1]

Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.

THOUGH falsity of addition or demonstration doth not hurt where you give a thing a proper name; yet nevertheless if it stand doubtful upon the words, whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood.

And therefore, if the parish of Hurst do extend into the counties of Wiltshire and Berkshire, and I grant my close called Callis, situate and lying in the parish of Hurst in the county of Wiltshire; and the truth is that the whole close lieth in the county of Berkshire; yet the law is that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name which the false reference doth not destroy; and not upon the reason that these words, "in the county of Wiltshire," shall be taken to go to the parish only, and so to be true in some sort, and not to the close, and so to be false: for if I had granted *omnes terras meas in parochia de Hurst in com. Wiltshire*, and I had no lands in Wiltshire but in Berkshire, nothing had past. But in the principal case, if the close called Callis had extended part into Wiltshire and part into Berkshire, then only that part had passed which lay in Wiltshire. Dy. f. 292. pl. 72. [18 Eliz.]

So if I grant *omnes et singulas terras meas in tenura I. D. quas perquisivi de I. N. in indentura dimissionis fact' I. B. specificat':* if I have land wherein some of these references are true and the rest false, and no land wherein they are all true, nothing passeth: as if I have land in the tenure of I. D. and purchased of I. N. but not specified in the indenture to I. B. or if I have land which I purchased of I. N. and specified in the indenture of demise to I. B. and not in the tenure of I. D.: but if I have some land wherein all these demonstrations are true, and some [29 Reg.]

[1] Omitted in Camb. MS.

wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true.

REGULA XIV.[1]

Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.

The law doth not allow of grants except there be a foundation of an interest in the grantor: for the law,—that will not accept of grants of titles or of things in action, which are imperfect interests,—much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But of declarations precedent before any interest vested the law doth allow; but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent.

Now the best rule of distinction between grants and declarations is, that grants are never countermandable—not in respect of the nature of the conveyance or instrument, though sometime in respect of the interest granted they are: whereas declarations are evermore countermandable in their natures.

[30 Eliz.] 19 H. 6. f. 62. And therefore if I grant unto you that, if you enter into an obligation to me of one hundred pounds and after do procure me such a lease, that then the same obligation shall be void; and you enter into such an obligation unto me, and afterwards do procure such a lease: yet the obligation is simple, because the defeasance was made of that which was not.

[27 Ed. 3.] So if I grant unto you a rent charge out of white acre, and that it shall be lawful for you to distrain in all my other lands whereof I am now seised and which I shall hereafter purchase; although this be but a liberty of distress, and no rent save only out of white acre, yet as to the lands afterwards to be purchased the clause is void.

[24 Eliz.] So if a reversion be granted to I. S., and I. D. a stranger by his deed do grant to I. S. that, if he purchase the particular estate, he doth attorne to the grant; this is a void attornment,

[1] Omitted in Camb. MS.

notwithstanding he doth afterwards purchase the particular estate.

But of declarations the law is contrary: as if the disseisee make a charter of feoffment to I. S. and a letter of attorney to enter and make livery of seisin, and deliver the deed of feoffment, and afterwards livery of seisin is made accordingly; this is a good feoffment: and yet he had nothing other than in right at the time of the delivery of the charter; but because a deed of feoffment is but matter of declaration and evidence, and there is a new act which is the livery subsequent, therefore it is good in law. [13, 14 Eliz. 20, 21 Eliz. 25 Eliz.] [M. 38. et 39 Eliz.]

So if a man make a feoffment to I. S. upon condition to enfeoff I. N. within certain days, and there are deeds made both of the first feoffment and the second, and letters of attorney according, and both these deeds of feoffment and letters of attorney are delivered at a time, so that the second deed of feoffment and letter of attorney are delivered when the first feoffee hath nothing in the land; yet if both liveries be made according, all is good. [37 Eliz. Dacre's case.]

So if I covenant with I. S. by indenture, that before such a day I will purchase the manor of D. and before the same day I will levy a fine of the same land, and that the same fine shall be to certain uses which I express in the same indenture; this indenture to lead uses, being but matter of declaration and countermandable at my pleasure, will suffice, though the land be purchased after; because there is a new act to be done, namely the fine.

But if there were no new act, then otherwise it is: as if I covenant with my son in consideration of natural love to stand seised to his use of the lands which I shall afterwards purchase, and I do afterwards purchase; yet the use is void: and the reason is, because there is no new act, nor transmutation of possession following, to perfect this inception; for the use must be limited by the feoffor, and not by the feoffee, and he had nothing at the time of the covenant. [26 Eliz. 27 Eliz.]

So if I devise the manor of D. by special name, of which at that time I am not seised, and after I purchase it; except I make some new publication of my will, this devise is void: and the reason is, because that my death, which is the consummation of my will, is the act of God, and not my act; and therefore no such act as the law requireth. Brett v. Rigden. Plow. 1. 340.

But if I grant unto I. S. authority by my deed to demise for years the land whereof I am now seised or hereafter shall be seised; and after I purchase lands, and I. S. my attorney doth demise them; this is a good demise: because the demise of my attorney is a new act, and all one with a demise by myself.

[21 Eliz.] But if I mortgage land, and after covenant with I. S. in consideration of money which I receive of him, that after I have entered for the condition broken I will stand seised to the use of the same I. S. and I enter, and this deed is enrolled, and all within the six months; yet nothing passeth; because this enrolment is no new act, but a perfective ceremony of the first deed of bargain and sale. And the law is more strong in that case, because of the vehement relation which the enrolment hath to the time of the bargain and sale, at what time he had nothing but a naked condition.

Bro. Tit. Faits Enroll. pl. 9. So if two joint tenants be, and one of them bargain and sell the whole land, and before the enrolment his companion dieth; nothing passeth of the moiety accrued unto him by survivor.

REGULA XV.

In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.

ALL crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of that error if another particular ensue of as high a nature.

Sander's case. Plow. f. 474. Therefore if an impoisoned apple be laid in a place to poison I. S., and I. D. cometh by chance and eateth it; this is murder in the principal that is actor: and yet the malice *in individuo* was not against I. D.

So if a thief find the door open, and come in the night and rob a house, and be taken with the manner, and break a door to escape; this is burglary: yet the breaking of the door was without any felonious intent; but it is one entire act.

So if a caliver be discharged with a murderous intent at I. S. and the piece break and strike into the eye of him that dischargeth it, and killeth him, he is *felo de se*; and yet his inten-

tion was not to hurt himself: for *felonia de se* and murder are *crimina paris gradus.* For if a man persuade another to kill himself, and be present when he doth so, he is a murderer.

But *quære,* if I. S. lay impoisoned fruit for some other stranger his enemy, and his father or mother come and eat it, whether this be petty treason; because it is not altogether *crimen paris gradus.*

REGULA XVI.

Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.

In the committing of lawful authority to another, a man may limit it as strictly as it pleaseth him; and if the party authorised do transgress his authority, though it be but in circumstance expressed, it shall be void in the whole act. But when a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstance not pursued.

Therefore if I make a letter of attorney to I. S. to deliver livery of seisin in the capital messuage, and he doth it in another place of the land; or between the hours of two and three, and he doth it after or before; or if I make a charter of feoffment to I. D. and I. B. and express the seisin to be delivered to I. D. and my attorney deliver it to I. B.; in all these cases the act of the attorney, as to execute the estate, is void: but if I say generally to I. D. whom I mean only to enfeoff, and my attorney make it to his attorney, it shall be intended; for it is a livery to him in law. Dy. f. 337. pl. 87. Dy. f. 283. pl. 30. Dy. f. 62.

But on the other side, if a man command I. S. to rob I. D. on Shooters-hill, and he doth it on Gads-hill; or to rob him such a day, and he doth it the next day; or to kill I. D. and he doth it not himself but procureth I. B. to do it; or to kill him by poison, and he doth it by violence; in all these cases, notwithstanding the fact be not executed in circumstance, yet he is accessory nevertheless. Sander's case, Plow. f. 475

But if it be to kill I. S. and he killeth I. D. mistaking him for I. S. then the acts are distinct in substance, and he is not accessory. Ibidem.

And be it that the acts be of differing degrees, and yet of a kind; as if a man bid I. S. to pilfer away such a thing out of a

house, and precisely restrain him to do it some time when he is gotten in without breaking of the house, and yet he breaketh the house; yet he is accessory to the burglary: for a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands.

Ibidem. But if a man bid one rob I. S. as he goeth to Sturbridge-fair, and he rob him in his house; the variance seemeth to be of substance, and he is not accessory.

REGULA XVII.[1]

De fide et officio judicis non recipitur quæstio, sed de scientia, sive error sit juris sive facti.

THE law doth so much respect the certainty of judgments and the credit and authority of judges, as it will not permit any error to be assigned that impeacheth them in their trust and office and in wilful abuse of the same; but only in ignorance, and mistaking either of the law or of the case and matter in fact.

F. N. B. fo. 21. B. 7 H. 7. f. 4. pl. 4. And therefore if I will assign for error, that whereas the verdict passed for me, the court received it contrary, and so gave judgment against me; this shall not be accepted.

So if I will allege for error, that whereas I offered to plead a sufficient bar, the court refused it, and drave me from it; this error shall not be allowed.

But the great doubt is, where the court doth determine of the verity of the matter in fact, so that it is rather a point of trial than a point of judgment; whether it shall be re-examined in error.

[1 Mar. 5.] 28 Ass. pl. 5. 21 H. 7. f. 40. pl. 58. and f. 33. pl. 30. As if an appeal of mayhem be brought, and the court, by the assistance of chirurgeons, adjudge it to be a maim; whether the party grieved may bring a writ of error: and I hold the law to be he cannot.

So if one of the prothonotaries of the Common Pleas bring an assize of his office, and allege fees belonging to the same office in certainty, and issue be taken upon these fees; this issue shall be tried by the judges by way of examination; and if they determine it for the plaintiff, and he have judgment to recover

[1] Omitted in Camb. MS.

arrerages according, the defendant can bring no writ of error of this judgment, though the fees in truth be other.

So if a woman bring a writ of dower, and the tenant plead her husband was alive, this shall be tried by proofs and not by jury; and upon judgment given on either side no error lies. 8 H. 6. f. 22. pl. 7. Dy. f. 185. 43 Ass. pl. 26. 41 Ass. pl. 5. 39 Ass. pl. 9.

So if *nul tiel record* be pleaded, which is to be tried by the inspection of the record, and judgment be thereupon given; no error lieth. 5 Ed. 4. f. 3. pl. 25.

So if in an assize the tenant saith, he is *Count de Dale et nient nosme Count* in the writ; this shall be tried by the records of the Chancery, and upon judgment given no error lieth. 22 Ass. pl. 24.

So if a felon demand his clergy, and read well and distinctly, and the court who is judge thereof do put him from his clergy wrongfully, error shall never be brought upon this attainder.

So if upon judgment given upon confession or default the court do assess damages; the defendant shall never bring a writ of error, though the damages be outrageous.

And it seemeth in the case of maim and some other cases, that the court may dismiss themselves of discussing the matter by examination, and put it to a jury, and then the party grieved shall have his attaint; and therefore that the court, that doth deprive a man of his action, should be subject to an action: but, that notwithstanding, the law will not have, as was said in the beginning, the judges called in question in the point of their office when they undertake to discuss the issue. And that is the true reason: for to say that the reason of these cases should be, because trial by the court shall be peremptory as trial by certificate, (as by the bishop in case of bastardy, or by the marshal of the king, &c.); the cases are nothing like; for the reason of those cases of certificate is, because if the court should not give credit to the certificate, but should reexamine it, they have no other mean but to write again to the same lord bishop, or the same lord marshal; which were frivolous, because it is not to be presumed they would differ from their own former certificate; whereas in these other cases of error the matter is drawn before a superior court, to re-examine the errors of an inferior court: and therefore the true reason is, as was said, that to examine again that which the court had tried were in substance to attaint the court. 41 Ass. pl. 29. 7 H. 6. f. 37. pl. 44.

And therefore this is a certain rule in error: that error in law is ever of such matters as do appear upon record; and error

in fact is ever of such matters as are not crossed by the record; as, to allege the death of the tenant at the time of the judgment given, nothing appeareth to the contrary upon the record.

So when an infant levies a fine; it appeareth not upon the record that he is an infant; and therefore it is an error in fact, and shall be tried by inspection during nonage.

But if a writ of error be brought in the King's Bench of a fine levied by an infant, and the court by inspection and examination doth affirm the fine; the infant, though it be during his infancy, shall never bring a writ of error in parliament upon this judgment: not but that error lies after error; but because it doth now appear upon the record that he is of full age, therefore it can be no error in fact. And therefore if a man will assign for error in fact, that whereas the judges gave judgment for him, the clerks entered it in the roll against him; this error shall not be allowed: and yet it doth not touch the judges but the clerks; but the reason is, if it be an error, it is an error in fact; and you shall never allege an error in fact contrary to the record.

2 R. 3. f. 20. pl. 49.

9 Ed. 4. f. 3. pl. 12. F. N. Br. f. 21. B.

REGULA XVIII.

Persona conjuncta æquiparatur interesse proprio.

THE law hath that respect of nature and conjunction of blood, as in divers cases it compareth and matcheth nearness of blood with consideration of profit and interest; yea, and some cases alloweth of it more strongly.

Plow. f. 303.

Therefore if a man covenant, in consideration of blood, to stand seised to the use of his brother, or son, or near kinsman, an use is well raised by his covenant without transmutation of possession. Nevertheless it is true, that consideration of blood is naught[1] to ground a personal contract upon: as if I contract with my son, that in consideration of blood I will give unto him such a sum of money, this is a *nudum pactum*, and no *assumpsit* lieth upon it: [2]for to subject me to an action, there needeth a

[1] All the MSS. and early editions I know of have "not." The emendation, which I suppose to be conjectural, appears in the edition of 1778.

[2] For the rest of this paragraph the Camb. MS. has: "the reason whereof may partly be, because in contracts the mutual consideration must execute in both parties at the time, and partly because in contracts of things merely personal the law will not look further than the person; but doth match interests personal with considerations

consideration of benefit; but the use the law raiseth without suit or action. And besides, the law doth match real considerations with real agreements and covenants.

So if suit be commenced against me, my son or brother may maintain, as well as he in remainder for his interest, or a lawyer for his fee. So [1] if my brother have a suit against my nephew or cousin, it is at my election to maintain the cause of my nephew or cousin, though the adverse party be nearer unto me in blood. 19 Ed. 4. f. 36. pl. 9. 14. H. 6. f. 6. pl. 30.

So in challenges of juries, challenge of blood is as good as challenge within distress [2], and it is not material how far off the kindred be, so the pedigree can be conveyed in certainty, whether it be of the half blood or whole. 14 H. 7. f. 2. pl. 6. Plow. 425.

So if a man menace me, that he will imprison or hurt in body my father or my child except I make unto him such an obligation, I shall avoid this duresse, as well as if the duresse had been to mine own person: and yet if a man menace me with the taking away or destruction of my goods, this is no good duresse to plead: and the reason is, because the law can make me reparation of that loss, and so can it not of the other. 39 H. 6. f. 51. 7 Ed. 4. f. 21. pl. 24. 20 Ass. pl. 14.

So if a man under the years of twenty-one contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition. [Perk. 4. D. cap. 28.]

REGULA XIX.

Non impedit clausula derogatoria, quo minùs ab eadem potestate res dissolvantur, à quibus [3] *constituuntur.*

Acts which are in their nature revocable cannot by strength of words be fixed and perpetuated. Yet men have put in ure two means to bind themselves from changing or dissolving that which they have set down; whereof the one is *clausula derogatoria*, the other *interpositio juramenti*; whereof the former is only pertinent to the present purpose.

This *clausula derogatoria* is by the common practical term called *clausula non obstante*, and is of two sorts, *de preterito* and

personal, and interests of continuance, as uses of lands, with considerations of continuance, as considerations of blood."

[1] Omitted in Camb. MS.

[2] For the phrase see Co. Litt. 157 b. The rest of the paragraph is omitted in Camb. MS.

[3] See note, p. 325.

de futuro; the one weakening and disannulling any matter past to the contrary, the other any matter to come: and this latter is that only whereof we speak.

This *clausula non obstante de futuro* the law judgeth to be idle and of no force; because it doth deprive men of that which of all other things is most incident to human condition; and that is alteration or repentance.

Therefore if I make my will, and in the end thereof do add such like clause, "Also my will is, if I shall revoke this present will, or declare any new will, except the same shall be in writing, subscribed with the hands of two witnesses, that such revocation or new declaration shall be utterly void; and by these presents I do declare the same not to be my will, but this my former will to stand, any such pretended will to the contrary notwithstanding;" yet nevertheless this clause, or any the like never so exactly penned, and although it do restrain the revocation but in circumstance and not altogether, is of no force or efficacy to fortify the former will against the second; but I may by parole without writing repeal the same will and make a new.

28 Ed. 3. c. 7. 42 Ed. 3. c. 9. So if there be a statute made "that no sheriff shall continue in his office above a year, and if any patent be made to the contrary it shall be void; and if there be any *clausula non obstante* contained in such patent to dispense with the present act, that such clause also shall be void;" yet nevertheless a patent of a sheriff's office made by the king for term of life, with a *non obstante*, will be good in law, contrary to such statute which pretendeth to exclude *non obstantes:* and the reason is, because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind; and then the derogatory clause hurteth not.

Br. Tit. Pat. pl. 109.

So if an act of parliament be made wherein there is a clause contained, that it shall not be lawful for the king, by authority of parliament, during the space of seven years, to repeal and determine the same act; this is a void clause, and the same act may be repealed within the years. And yet if the parliament should enact in the nature of the ancient *lex regia*, that there should be no more parliaments held, but that the king should have the authority of the parliament[1]; this act were good in

[1] The Camb. MS. adds: "or, *è converso*, if the King by Parliament were to enact to alter the state, and to translate it from a monarchy to any other form; both these

law; *quia potestas suprema seipsum dissolvere potest, ligare non potest:* for as it is in the power of man to kill a man, but it is not in his power to save him alive and to restrain him from breathing or feeling; so it is in the power of parliament to extinguish or transfer their own authority, but not, whilst the authority remains entire, to restrain the functions and exercises of the same authority.

So in 28 of K. H. VIII. chap. 17. there was a statute made, that all acts that passed in the minority of kings, reckoning the same under years of twenty-four, might be annulled and revoked by their letters patents when they came to the same years; but this act in the first of K. Ed. VI. (who was then between the years of ten and eleven,) cap. 11. was repealed, and a new law surrogate in place thereof; wherein a more reasonable liberty was given, and wherein, though other laws are made revocable according to the provision of the former law with some new form prescribed, yet that very law of revocation, together with pardons, is made irrevocable and perpetual. So that there is a direct contrariety and repugnancy between these two laws: for if the former stands, which maketh all latter laws during the minority of kings revocable without exception of any law whatsoever, then that very law of repeal is concluded in the generality, and so itself made revocable; on the other side that law, making no doubt of the absolute repeal of the first law, though itself were made during the minority, which was the very case of the former law, in the new provision which it maketh hath a precise exception, that the law of repeal shall not be repealed. But the law is, that the first law by the impertinency of it was void *ab initio et ipso facto* without repeal: as if a law were made, that no new statute should be made during seven years, and the same statute be repealed within the seven years; if the first statute should be good, then no repeal could be made thereof within that time; for the law of repeal were a new law, and that were disabled by the former law; therefore it is void in itself, and the rule holds, *perpetua lex est, nullam* Dy. f. 312.

acts were good." It is, I think, not unimportant to observe, that this subsequently cancelled position stands in this MS. along with the immediately preceding one recognising an "inseparable prerogative" of the crown to dispense with a certain ill-defined class of statutes. It seems clear that this prerogative is conceived of as merely an "inseparable" part of the actual constitution of the realm, to be ascertained and defined by the regular tribunals, and not, as was maintained by some at that or a later day, derived from a source transcending all constitutions, into which it was profanity for a court to enquire.

legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit initio non valet.

Neither is the difference of the civil law so reasonable as colourable. For they distinguish and say, that a derogatory clause is good to disable any latter act, except you revoke the same clause before you proceed to establish any latter disposition or declaration: for they say, *clausula derogatoria ad alias sequentes voluntates posita in testamento, (viz. si testator dicat quod, si contigerit eum facere aliud testamentum, non vult illud valere) operatur quod sequens dispositio ab illa clausula reguletur; et per consequens quod sequens dispositio ducatur sine voluntate, et sic quod non sit attendendum.* The sense is: that where a former will is made, and after a latter will; the reason why, without an express revocation of the former will, it is by implication revoked is, because of the repugnancy between the disposition of the former and the latter; but where there is such a derogatory clause, there can be gathered no such repugnancy; because it seemeth the testator had a purpose at the making of the first will to make some shew of a new will, which nevertheless his intention was should not take place. But this was answered before; for if that clause were allowed to be good until a revocation, then could no revocation at all be made: therefore it must needs be void by operation of law at first. Thus much of *clausula derogatoria.*

REGULA XX.

Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest; si autem pendet ex voluntate tertiæ personæ, vel ex contingenti, revocari non potest.

In acts that are not fully executed and consummate, the law makes this difference: that if the first parties have put it in the power of a third person, or of a contingency, to give a perfection to their acts, then they have put it out of their own reach and liberty, and therefore there is no reason they should revoke them; but if the consummation depend upon the same consent which was the inception, then the law accounteth it vain to restrain them from revoking it: for as they may frustrate it by omission and *non feasance* at a certain time or in a certain sort

or circumstance, so the law permitteth them to dissolve it by an express consent before that time or without that circumstance.

Therefore if two exchange land by deed or without deed, and neither enter; they may make a revocation or dissolution of the same exchange by mutual consent, so it be by deed: but not by parole; forasmuch as the making of an exchange needeth no deed, because it is to be perfected by entry, which is a ceremony notorious in the nature of livery; but it cannot be dissolved but by deed, because it dischargeth that which is but title.

So if I contract with I. D. if he lay me into my cellar three tuns of wine before Michaelmas, that I will bring into his garner twenty quarters of wheat before Christmas; before either of these days the parties may by assent dissolve the contract: but after the first day there is a perfection given to the contract by action on the one side, and they may make cross releases by deed or parole, but never dissolve the contract. [F. 26 Eliz.

For there is a difference between dissolving the contract, and release or surrender of the thing contracted. As if lessee for twenty years make a lease for ten years, and after he[1] take a lease for five years, he is in only of his lease for five years: and yet this cannot inure by way of surrender, (for a petty lease derived out of a greater cannot be surrendered back again,) but it inureth only by dissolution of contract; for a lease of land is but a contract executory from time to time of the profits of the land to arise; as a man may sell his corn or his tithe to spring or to be perceived for divers future years.

But to return from our digression. On the other side, if I contract with you for cloth at such a price as I. S. shall name; there if I. S. refuse to name, the contract is void; but the parties cannot discharge it, because they have put it in the power of a third person to perfect.

So if I grant my reversion; though this be an imperfect act before atturnment, yet, because the atturnment is the act of a stranger, this is not simply revocable, but by a policy or circumstance in law; as by levying a fine, or making a bargain and sale, or the like.

So if I present a clerk to the bishop; now can I not revoke this presentation, because I have put it out of myself, that is, in the bishop, by admission to perfect my act begun. [Fitz. Tit. Qu. Imp. 185. 14 Ed. 4. f. 2. pl. 2. 38 Ed 3. f. 35, 36.][2]

[1] *i. e.* I suppose, the sub-lessee. The MSS. vary considerably.

[2] The cases by no means establish the position in the text.

The same difference appeareth in nominations and elections: as if I enfeoff I. S. upon condition to enfeoff such a one as I. D. shall name within a year, and I. D. name I. B.: yet before the feoffment and within the year, I. D. may countermand his nomination and name again, because no interest passeth out of him: but if I enfeoff I. S. to the use of such a one as I. D. shall name within a year, then if I. D. name I. B. it is not revocable, because the use passeth presently by operation of law.

So in judicial acts the rule of the civil law holdeth, *sententia interlocutoria revocari potest, definitiva non potest;* that is, an order may be revoked, but a judgment cannot: and the reason is, because there is title of execution or of bar given presently unto the party upon judgment, and so it is out of the judge to revoke in courts ordered by the common law.

REGULA XXI.

Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non fulcitur.

Clausula vel dispositio inutilis are said, when the act or the words do work or express no more than law by intendment would have supplied: and therefore the doubling or iterating of that, and no more, which the conceit of law doth in a sort prevent and preoccupate, is reputed nugation; and is not supported and made of substance either by foreign intendment of some purpose, in regard whereof it might be material, nor upon any cause or matter emerging afterwards, which may induce an operation of those idle words or acts.

Brook, Tit. Gard. pl. 93. Tit. Devise, pl. 41.

And therefore if a man devise land at this day to his son and heir, this is a void devise; because the disposition of law did cast the same upon the heir by descent: and yet if it be knight's service land, and the heir within age, if he take by the devise he shall have two parts of the profits to his own use, and the guardian shall have benefit but of the third. But if a man devise land to his two daughters, having no sons, then the devise is good; because he doth alter the disposition of law: for by the law they should take in coparcenary, but by the devise they shall take jointly; and this is not any foreign collateral purpose, but in point of taking of estate.

So if a man make a feoffment in fee to the use of his last will

and testament, these words of special limitation are void, and the law reserveth the ancient use to the feoffor and his heirs: and yet if the words might stand, then should it be authority by his will to declare and appoint uses, and then, though it were knight's service land, he might dispose the whole: as if a man make a feoffment in fee to the use of the will and testament of a stranger; there the stranger may declare an use of the whole by his will, notwithstanding it be knight's service land. But the reason of the principal case is, because uses before the statute of 27 H. 8. were to have been disposed by will; and therefore before that statute an use limited in the form aforesaid was but a frivolous limitation, in regard that the old use which the law reserved was devisable; and the statute of 27 altereth not the law as to the creating and limiting of any use; and therefore, after that statute and before the statute of wills, when no land could have been devised, yet it was a void limitation as before, and so continueth at this day.

Dy. f. 12.

19 H. 8. f. 11. pl. 5. 5 Ed. 4. f. 8. pl. 20.

But if I make a feoffment in fee to the use of my last will and testament, thereby to declare an estate tail and no greater estate, and after my death, and after such estate declared shall expire, or in default of such declaration, then to the use of I. S. and his heirs, this is a good limitation; and I may by my will declare an use of the whole land to a stranger, though it be held in knight's service; and yet I have an estate in fee simple by virtue of the old use during life.

So if I make a feoffment in fee to the use of my right heirs, this is a void limitation, and the use reserved by the law doth take place: and yet, if the limitation should be good, the heir should come in by way of purchase, who otherwise cometh in by descent: but this is but a circumstance which the law respecteth not, as was proved before. But if I make a feoffment in fee to the use of my right heirs and the right heirs of I. S. this is a good use; because I have altered the disposition of law. Neither is it void for a moiety, but both our right heirs when they come in being shall take by joint purchase; and he to whom it first falleth shall take the whole, subject nevertheless to his companion's title, so it have not descended from the first heir to the heir of the heir: for a man cannot be joint-tenant claiming by purchase, and the other by descent; because they be several titles.

Dy. f. 227. pl. 31.

30 Ass. pl. 47. 30 Ed. 3. f. 27, 28. Fits. Tit. Devise, pl. 9. Bro. Tit. Don. & Rem. pl. 21.

So if a man having land on the part of his mother make a

feoffment in fee to the use of himself and his heirs; this use, though expressed, shall not go to him and the heirs on the part of his father as a new purchase, no more than it should have done if it had been a feoffment in fee nakedly without consideration; for the intendment is remote. But if baron and feme be, and they join in a fine of the feme's land, and express an use to the husband and wife and their heirs; this limitation shall give a joint estate by entierties to them both; because the intendment of law would have conveyed the use to the feme alone. And thus much touching foreign intendments.

Dyer, f. 134.

For matter *ex post facto:* if a lease for life be made to two and the survivor of them, and they after make partition; now these words "and the survivor of them" should seem to carry purpose as a limitation, that either of them should be estated of his part for both their lives severally: but yet the law at the first construeth the words but words of dilating to describe a joint estate; and if one of them die after partition, there shall be no occupant, but his part shall revert.

30 Ass. pl. 8. Fits. Tit. Partit. pl. 16. Dy. f. 46. pl. 7.

So if a man grant a rent charge out of ten acres, and grant further that the whole rent shall issue out of every acre, and distress accordingly, and afterwards the grantee purchase an acre: now this clause should seem to be material to uphold the rent; but yet nevertheless the law at the first accepteth of these words but as words of explanation, and, them notwithstanding, the whole rent is extinct.

So[1] if a gift in tail be made upon condition that, if tenant in tail die without issue, it shall be lawful for the donor to enter; and the donee discontinue and die without issue: now this condition should seem material to give him benefit of entry; but because it did at the first limit the estate according to the limitation of law, it worketh nothing upon this matter emergent afterward.

Plow. f. 33. per Hinde.

So if a gift in tail be made of lands held in knight's service, with an express reservation of the same service whereby the land is held over, and the gift is with warranty, and the land is evicted, and other land recovered in value against the donor held in socage: now the tenure which the law creates between the donor and donee shall be in socage, and not in knight's service; because the first reservation was according to owelty of service, which was no more than the law would have reserved

[1] Omitted in Camb. MS.

But if a gift in tail had been made of lands held in socage, with a reservation of knight's service tenure, and with warranty; then, because the intendment of law is altered, the new land shall be held by the same service the lost land was, without any regard at all to the tenure paramount. And thus much of matter *ex post facto.*

This rule faileth where that the law saith as much as the party, but upon foreign matter not pregnant and appearing upon the same act and conveyance. As if lessee for life be, and he lets for twenty years, if he live so long; this limitation "if he live so long" is no more than the law saith; but it doth not appear upon the same conveyance or act that this limitation is nugatory, but it is foreign matter in respect of the truth of the estate whence the lease is derived; and therefore, if lessee for life make a feoffment in fee, yet the estate of the lessee for years is not enlarged against the feoffee: otherwise had it been if such limitation had not been, but that it had been left only to the law.

So if tenant after possibility make a lease for years, and the donor confirms to the lessee to hold without impeachment of waste during the life of tenant in tail; this is no more than the law saith: but the privilege of tenant after possibility is foreign matter as to the lease and confirmation; and therefore if tenant after possibility do surrender, yet the lessee shall hold dispunishable of waste: otherwise had it been if no such confirmation had been made.

Also heed must be given that it be indeed the same thing, which the law intendeth, and which the party expresseth; and not only like or resembling, and such as may stand both together: for if I let land for life rendering rent, and by my deed warrant the same land; this warranty in law and warranty in deed are not the same thing, but may both stand together.[1]

There remaineth yet a great question on this rule:

A principal reason whereupon this rule is built should seem to be, because such acts or clauses are thought to be but declaratory, and added upon ignorance of the law and *ex consuetudine clericorum* upon observing of a common form, and not upon purpose or meaning; and therefore whether by particular and precise words a man may not control the intendment of the law?

[1] The Camb. MS. adds: "therefore if I release the rent, I shall warrant nevertheless upon the warranty in fact."

To this I answer, that no precise nor express words will control this intendment of law; but as the general words are void, because they say that the law saith, so the particular words are void, because they say contrary to that which the law saith, and so are thought to be against the law. And therefore if I demise my land being knight's service tenure to my heir, and express my intention to be, that the one part shall descend to him as the third appointed by statute, and the other he shall take by devise to his own use; yet this is void: for the law saith he is in by descent of the whole, and I say he shall be in by devise; which is against the law.

Lit. secs. 362. 364. But if I make a gift in tail, and say upon condition that if tenant in tail discontinue and after die without issue, it shall be lawful for me to enter; this is a good clause to make a condition, because it is but in one case, and doth not cross the law generally: for if the tenant in tail in that case be disseised, and a descent cast, and die without issue; I that am the donor shall not enter. But if the clause had been, provided that if tenant in tail discontinue, or suffer a descent, or do any other act whatsoever, that after his death without issue it shall be lawful for me to enter; now this is a void condition: for it importeth a repugnancy to law; as if I would over-rule that, where the law saith I am put to my action, I nevertheless will reserve to myself an entry.

REGULA XXII.

Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit.

ALTHOUGH choice and election be a badge of consent; yet if the first ground of the act be duresse, the law will not construe that the duresse doth determine, if the party duressed do make any motion or offer.

And therefore if a party menace me, except I make unto him a bond of forty pounds; and I tell him that I will not do it, but I will make him a bond of twenty pounds; the law will not expound this bond to be voluntary, but will rather make construction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion notwithstanding into the lesser.

But if I will draw any consideration to myself; as if I had said, I will enter into your bond of forty pounds if you will deliver me that piece of plate; now the duresse is discharged: and yet if it had moved from the duressor, who had said at the first, You shall take this piece of plate, and make me a bond of forty pounds; now the gift of the plate had been good, and yet the bond shall be avoided by duresse.

REGULA XXIII.

Licita bene miscentur, formula nisi juris obstet.

THE law giveth that favour to lawful acts that, although they be executed by several authorities, yet the whole act is good.

As when tenant for life is, the remainder for life, the remainder in fee; and they join in livery by deed, or without; this is one good entire livery drawn from them all, and doth not inure by surrender of the particular estate, if it be without deed, or by confirmation of those in the remainder, if it be by deed; but they are all parties to the livery.[1]

So if tenant for life, the remainder in fee, be; and they join in granting a rent charge, this is one solid rent out of both their estates, and no double rent, nor rent by confirmation.

So if tenant in tail be at this day, and he make a lease for three lives and his own; this is a good lease, and warranted by the statute of 32 H. VIII. and yet it is good in part by the authority which tenant in tail hath by the common law, that is for his own life, and in part by the authority which he hath by the statute, that is for the other three lives.

So if a man be seised of lands devisable by custom, and of other lands held in knight's service, and devise all his lands; this is a good devise of all the lands customary by the common law, and of two parts of the other lands by the statute.

So in the Star-chamber a sentence may be good, grounded

[1] A commentator in the first edition observes that the law is clearly contrary, and cites many authorities. It seems to me one of the clearest instances of Bacon's intentional "correction of the law."

in part upon the authority given the court by the statute of 3 H. VII. and in part upon that ancient authority which the court hath by the common law[1], and so upon several commissions.

But if there be any form which the law appointeth to be observed which cannot agree with the diversity of authorities, then this rule faileth; as if three coparceners be, and one of them alien her purparty; the feoffee and one of the sisters cannot join in a writ *de part' facienda*, because it behoveth the feoffee to mention the statute in his writ.

Co. Litt. 175 b.

REGULA XXIV.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.

THERE be three degrees of certainty; presence; name; and demonstration or reference: whereof the presence the law holdeth of greatest dignity; the name in the second degree; and the demonstration or reference in the lowest; and always error or falsity in the less worthy shall not control nor frustrate sufficient certainty and verity in the more worthy.

And therefore if I give a horse to I. D. being present, and say unto him, I. S. take this; this is a good gift, notwithstanding I call him by a wrong name: but so had it not been if I had delivered the horse to a stranger to the use of I. S. where I meant I. D.

So if I say unto I. S. Here I give you my ring with the ruby, and deliver it with my hand, and the ring bear a diamond and no ruby; this is a good gift notwithstanding I named it amiss: so had it not been if by word or writing, without the delivery of the ring itself, I had given the ring with the ruby; although I had none such, but only one with a diamond, which I meant, yet it would not have passed.

So if I by deed grant unto you by general words all the lands which the King hath passed unto me by letters patent dated 1° Maii, unto this present indenture annexed; and the patent annexed have date 1° Julii; yet if it be proved that

[1] The two MSS. in the Br. Mus. introduce here, "and yet no Bishop or Lord Temporal present;" besides some other verbal differences.

that was the true patent annexed, the presence of the patent maketh the error of the date recited not material: but if no patent had been annexed, and there had been also no other certainty given but the reference of the patent the date whereof was misrecited; although I had no other patent ever of the King, yet nothing would have passed.

Like law is it, but more doubtful, where there is not a presence, but a kind of representation; which is less worthy than a presence, and yet more worthy than a name or reference.

As if I covenant with my ward, that I will tender unto him no other marriage than the gentlewoman whose picture I delivered him, and that picture hath about it *ætatis suæ anno* 16, and the gentlewoman is seventeen years old; yet nevertheless, if it can be proved that the picture was made for that gentlewoman, I may, notwithstanding this mistaking, tender her well enough.

So if I grant you for life a way over my land, according to a plot indented between us; and, after, I grant unto you and your heirs a way according to the first plot indented, whereof a double is annexed to these presents; and there be some special variance between the double and the original plot: yet this representation shall be certainty sufficient to lead unto the first plot; and you shall have the way in fee nevertheless, according to the first plot, and not according to the double.

So if I grant unto you by general words the land which the King hath granted me by his letters patent, *quarum tenor sequitur in hæc verba*, &c. and there be some mistaking in the recital and variance from the original patent, although it be in a point material; yet the representation of this whole patent shall be as the annexing of the true patent, and the grant shall not be void by this variance.

Now, for the second part of this rule, touching the name and the reference; for the explaining thereof it must be noted what things sound in name or denomination, and what things sound in demonstration or addition: as first, in lands the greatest certainty is, where the land hath a proper name and cognizance; as, "the manor of Dale," "Grandfield," &c.: the next is equal to that, when the land is set forth by bounds and abuttals, as "a close of pasture abutting on the east part upon

Emsden Wood, on the south upon, &c." It is also a sufficient name to lay the general boundary, that is, some place of larger precinct, if there be no other land to pass in the same precinct; as "all my lands in Dale," "my tenement in St. Dunstan's parish," &c. A fourth sort of denomination is, to name lands by the attendancy they have to other lands more notorious; as "parcel of my manor of D." "belonging to such a college," "lying upon Thames' Bank, &c."

All these things or notes sound in name or denomination of lands; because they be signs local, and therefore of property to signify and name a place.

But these notes, that sound only in demonstration or addition, are such as are but transitory and accidental to the nature of a place:

As, *modo in tenura et occupatione* I. S. For the proprietary, tenure, or possession is but a thing transitory in respect of land; *Generatio venit, generatio migrat, terra autem manet in æternum.*

So likewise matter of conveyance, title, or instrument:

As, *quæ perquisivi de I. D.* or *quæ descendebant à I. N. patre meo,* or, *in prædicta indentura dimissionis,* or, *in prædictis literis patentibus specificat'.*

So likewise, *continent' per æstimationem* 20 *acras:* or if *per æstimationem* be left out, all is one, for it is understood; and this matter of measure, though it seem local, yet it is indeed but opinion and observation of men.

This distinction being made, the rule is to be examined by it.

Therefore if I grant my close called Dale, in the parish of Hurst, in the county of Southampton; and the parish likewise extendeth into the county of Berkshire, and the whole close of Dale lieth in the county of Berkshire; yet because the parcel is specially named, the falsity of the addition hurteth not; and yet this addition did sound in name; but, as was said, it was less worthy than a proper name.

So if I grant *tenementum meum,* or *omnia tenementa mea,* (for the universal and indefinite to this purpose are all one) *in parochia Sancti Butolphi extra Aldgate,* where the verity is *extra Bishopsgate, in tenura Guilielmi,* which is true; yet this grant is void, because that which sounds in denomination is false, which is the more worthy, and that which sounds in addition is true,

which is the less; and though *in tenura Guilielmi*, which is true, had been first placed, yet it had been all one, the notes being of unequal dignity. See 3 Co. 10.

But if I grant *tenementum meum quod perquisivi de R. C. in Dale*, where the truth was T. C., and I have no other tenement in Dale but one; this grant is good, because that which soundeth in name, namely, *in Dale*, is true, and that which sounded in addition, *viz. quod perquisivi*, &c., is only false.

So if I grant *prata mea in Sale continentia* 10 *acras*, and they contain indeed 20 acres, the whole twenty pass.

So if I grant all my lands, being parcels *manerii de D. in prædictis literis patentibus specificat'*, and there be no letters patent; yet the grant is good enough.

The like reason holds in demonstration of persons that hath been declared in demonstration of lands and places: the proper name of every one is in certainty worthiest; next are such appellations as are fixed to his person, or at least of continuance, as "son of such a man," "wife of such a husband," or additions of office, as "clerk of such a court," &c.; and the third are particular actions or accidents, which sound no way in appellation or name but only in circumstance, which are less worthy, although they may have a more particular reference to the intention of the grant.

And therefore if an obligation be made to I. S. *filio et hæredi G. S.* where indeed he is a bastard; yet the obligation is good.

So if I grant land *Episcopo nunc Londinensi qui me erudivit in pueritia;* this is a good grant, although he never instructed me.

But *è converso*, if I grant land to I. S. *filio et hæredi G. S.* and it be true that he is son and heir unto G. S. but his name is Thomas; this is a void grant.

Or if in the former grant it was the Bishop of Canterbury who taught me in my childhood, yet shall it be good, as was said, to the Bishop of London, and not to the Bishop of Canterbury.

The same rule holdeth in denomination of times; which are, such a day of the month, such a day of the week, such a Saint's day or eve, to-day, to-morrow: these are names of times: but the day that I was born, the day that I was married; these are but circumstances and additions of times.

And therefore if I bind myself to do some personal attend-

ance upon you upon Innocents' day, being the day of your birth, and you were not born that day; yet shall I attend.

There rest yet two questions of difficulty upon this rule:

First, of such things whereof men take not so much note, as that they fall into this distinction of name and of addition: as, "my box of ivory lying in my study, sealed up with my seal of arms;" "my suit of arras with the story of the nativity and passion:" of such things there can be no name, but all is of description and circumstance; and of these I hold the law to be, that precise truth of all recited circumstances is not required, but in such things, *ex multitudine signorum colligitur identitas.*

Therefore though my box were not sealed, and although the arras had the story of the nativity, and not of the passion, if I had no other box, nor no other suit, the gifts are good; and there is certainty sufficient: for the law doth not expect a precise description of such things as have no certain denomination.

Secondly, Of such things as do admit the distinction of name and of addition, but the notes fall out to be of equal dignity, all of name, or all of addition: as, *prata mea juxta communem fossam in D.* whereof the one is true, the other false; or *tenementum meum in tenura Guilielmi quod perquisivi de R. C. in prædict' indent' specificat'*, whereof one is true, and two are false, or two are true, and one false: so *ad curiam quam tenebat die Mercurii tertio die Martii*, whereof the one is true, the other false.

In these cases the former rule, *ex multitudine signorum*, &c. holdeth not; neither is the placing of the falsity or verity first or last material; but all must be true, or else the grant is void: always understood, that if you can reconcile all the words, and make no falsity, that is a case quite out of this rule, which hath place only where there is a direct contrariety or falsity not to be reconciled to this rule.

As if I grant all my land in D. *in tenura I. S.* which I purchased of I. N. specified in a demise to I. D. and I have lands in D. whereof in part of them all these circumstances are true, but I have other lands in D. wherein some of them fail; this grant will not pass all my land in D.: for here these are references, and no words of falsity or error, but of limitation and restraint.

REGULA XXV.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.

THERE be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other is *ambiguitas latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity for any thing that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.

Ambiguitas patens is never holpen by averment: and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

Therefore if a man give land to *I. D. et I. S. et hæredibus*, and do not limit to whether of their heirs; it shall not be supplied by averment to whether of them the intention was the inheritance should be limited.

So if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner, "Provided that if he, or they, or any of them do any act, &c.," according to the usual clauses of perpetuities; it cannot be averred, upon the ambiguity of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder and the heirs of his body, and that the tenant in tail in possession was meant to be at large. Cheyney's case, 5 Co. 68.

Of these infinite cases might be put: for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election; but never by averment, but rather shall make the deed void for uncertainty.

But if it be *ambiguitas latens*, then otherwise it is. As if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that I have the manors both of South S. and North S. this ambiguity

is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the parties intended should pass. So if I grant my tenement in the parish of St. Dunstan's, and I have two tenements there; this uncertainty shall be supplied by averment of intention.

But if I set forth my grant by quantity; then it shall be supplied by election, and not by averment.

As if I grant ten acres of wood in Sale, where I have a hundred acres; whether I say it in my deed or no that I grant out of my hundred acres, yet here there shall be an election in the grantee, which ten he will take. And the reason is plain: for the presumption of law is, where the thing is only nominated by quantity, that the parties had an indifferent intention which should be taken; and there being no cause to help the uncertainty by intention, it shall be holpen by election.

But in the former cases the difference holdeth, where it is expressed, and where not. For if I recite, Whereas I am seised of the manor of North S. and South S. I lease unto you *unum manerium de S.* there it is clearly an election: and so if I recite, Whereas I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election. Contrary law it is in the cases before, where I take no knowledge of the uncertainty; for there it is never an election, but an averment of intention: except the intent were of an election, which may also be specially averred.

Another sort of *ambiguitas latens* is correlative unto this: for this ambiguity spoken of before is, when one name and appellation doth denominate divers things; and the second is, when the same thing is called by divers names.

As if I give lands to Christ-Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford;* this shall be holpen by averment, because there appears no ambiguity in the words: for the variance is matter in fact.

But the averment shall not be of the intention, because it doth not stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance; and therefore the averment must be of matter that doth induce a cer-

tainty[1], and not of intention: As to say, that the precinct of "Oxford," and of "the University of Oxford," is one and the same; and not to say, that the intention of the parties was, that the grant should be to Christ-Church in the University of Oxford.

[1] I have conjecturally substituted "certainty" for "quantity." One MS. has a blank.

READING

ON THE

STATUTE OF USES.

PREFACE.

THIS was Bacon's Double Reading[1] in Gray's Inn, in the Lent vacation, A.D. 1600. Coke had read to crowded audiences in the Inner Temple on the same subject in 1592[2], and Bacon had argued for the defendants in the great Chudleigh case in 1594; so that we can readily imagine motives for this choice of subject. We have, however, no indication of his having taken any care of his work after the delivery.[3]

It was first published very incorrectly and evidently from a bad MS., in 1642. Better MSS. have been used and more pains taken by subsequent editors. I have used the common editions and three MSS. in the Harleian collection, Nos. 1858, 6688, and 829, (whereof the second ends abruptly in the middle, and the latter only embraces the last part or "division,") taking indiscriminately what appeared to me the best reading from each. Any merely conjectural emendations of my own I have always noticed as such, as also those various readings which make a serious difference in meaning, but not generally those which are mere matters of style, or which make a clear sense where the common reading was obviously corrupt.

Mr. Rowe, in his elaborately annotated edition of 1804, has divided the treatise into three discourses, corresponding to the portions to which I have affixed separate headings. He has not, however, taken any notice of the plan of the work as indicated by Bacon himself, nor at all adequately pointed out how much is missing of what that plan embraced.

[1] One of the Ancients that had formerly read reads in Lent vacation, and is called Double Reader. *Preface to* 3 *Rep.* From several entries in the books of Gray's Inn, to which I have had access by the kindness of the treasurer, Mr. Broderip, it seems there was some difficulty in getting the office well filled. In 36 Eliz. the Judges made an order giving them audience next after serjeants.

[2] Article *Coke* in *Penny Cyclopædia.*

[3] But see *infra*, p. 402. note 3.

The reading was to extend over six days [1], and on each day there was to be provided an introductory discourse on matter without the statute, a division on the statute, and a few cases for exercise and argument.

The subjects of the six introductions are set forth, and it is very clear that the first part of our treatise exactly corresponds with the first day's matter. The only deficiency I can conjecture is in the recapitulation at the close, which stops short with the "nature and definition of an use," and omits "its inception and progress," which are fully discoursed upon in the body of the lecture.

But it seems equally clear that we have no fragment of any of the other five intended introductions. The remainder of our treatise is entirely on "the law itself;" and besides, the subject of the second day's introduction was to be "the second spring of this tree of uses since the statute," which naturally required the exposition of the statute itself to have gone before.

Bacon not having laid out his six days' divisions as he has his introductions, we can only infer or conjecture the proportion in length of what we have of them to what is missing. Although, guided by MS. authority and the indications of the text, I have separated the general view of the statute from the detailed exposition of the law which follows, yet I incline to think that we have but the first day's work altogether; though it must be admitted that to master the whole of the existing treatise in one day was a hard task for students even in that much listening generation. My reason is, that in page 423., in the opening of the statute, he promises to handle, "in the next day's discourse," the question whether uses shall be executed out of the possession of a disseisor, or other possessions out of privity; and in page 437., in the division on the actors to the conveyance, he refers the subject of the occupant, the disseisor, the lord by escheat, and the feoffee upon consideration without notice, (which seems to be the same question as before, only set out in more detail,) to a division still to come.

What is more material to observe is, that of the three heads on which he was to lecture, viz. the raising, the interruption, and the executing of uses, we have nothing at all of the last

[1] In the books of Gray's Inn is copied an order of the Judges that each double reader should give at least nine readings.

two; and that of the three subdivisions of the first head, viz. on the actors in the conveyance, the use itself, and the form of the conveyance, the first only is here handled.

Excepting therefore incidentally, or by way of inference from his mode of laying down the general principles of the doctrine of uses, we have here no record of Bacon's opinions (and still less of the arguments on which he would found them,) on the chief of those knotty questions which were occupying the courts in his time, and which were much discussed but by no means settled in Chudleigh's case. I have thought it worth while, in some notes at the end of the treatise, to make a few observations on those passages which indicate the result one may suppose he had arrived at, as well as on the difficulty there is, as it appears to me, in reconciling them all. As regards minor points and details of exposition, I have in general contented myself with indicating by a side reference (usually furnished to my hand by one or other of my predecessors) the cases which Bacon had, or ought to have had, before him when he wrote; leaving the reader to inquire for himself, if he so incline, whether the text expounds the law soundly or not.

THE

LEARNED READING OF MR. FRANCIS BACON,

ONE OF HER MAJESTY'S COUNSEL AT LAW,

UPON THE STATUTE OF USES:

BEING HIS DOUBLE READING TO THE HONOURABLE SOCIETY OF GRAY'S INN. 42 ELIZ.

INTRODUCTORY DISCOURSE.

I HAVE chosen to read upon the Statute of Uses, made 27 H. VIII. ch. 10., a law whereupon the inheritances of this realm are tossed at this day, as upon a sea, in such sort that it is hard to say which bark will sink, and which will get to the haven: that is to say, what assurances will stand good, and what will not. Neither is this any lack or default in the pilots, the grave and learned judges; but the tides and currents of received errors and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to the law. So as this statute is in great part as a law made in the Parliament held 35 Reginæ: for in 37 Reginæ, by the notable judgment given upon solemn arguments of all the judges assembled in the Exchequer Chamber, in the famous case between Dillon and Freine, concerning an assurance made by Chudleigh, this law began to be reduced to a true and sound exposition; and the false and perverted exposition which had continued for so many years (but, howsoever, never countenanced by any rule or authority of weight, but only entertained in a popular conceit and put in practice at adventure) grew to be controlled.[1] Since which time, as it cometh to pass always

Chudleigh's case, 1 Rep. 121. Poph. 71. 1 And. 314.

[1] See Note A. at the end.

upon the first reforming of inveterate errors, many doubts and perplexed questions have risen, which are not yet resolved, nor the law thereupon settled: the consideration whereof moved me to take the occasion of performing this particular duty to the house, to see if I could spend my travel to a more general good of the commonwealth herein. Wherein, though I could not be ignorant either of the difficulty of the matter, which he that taketh in hand shall soon find, or much less of my own unableness, which I had continual sense and feeling of; yet, because I had more means of observation[1] than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect: the rather because where an inferior wit is bent and constant upon one subject, he shall many times, with patience and meditation, dissolve and undo many of those knots which a greater wit, distracted with many matters, would rather cut in two than unknit. At the least, if my invention or judgment be too barren or too weak, yet, by the benefit of other arts, I did hope to dispose or digest the authorities and opinions which are in cases of uses in such order and method as they should take light one from another, though they took no light from me.

And like to the matter of my reading shall my manner be; for my meaning is to revive and recontinue the ancient form of reading, which you may see in Mr. Frowicke's upon the prerogative and all other readings of ancient time, being of less ostentation and more fruit than the manner lately accustomed. For the use then was, substantially to expound the statutes by grounds and diversities, (as you shall find the readings still to run upon cases of like law and contrary law; whereof the one includes the learning of a ground, the other the learning of a difference,) and not to stir conceits and subtle doubts, or to contrive a multitude of tedious and intricate cases, whereof all, saving one, are buried, and the greater part of that one case which is taken is commonly nothing to the matter in hand. But my labour shall be in the ancient course, to open the law upon doubts, and not to open doubts upon the law.

The exposition of this statute consists upon matter without the statute, and matter within the statute.

[1] So Harl. MS. 6688. The common reading is "absolution."

There be three things concerning this statute, and all other statutes, which are helps and inducements to the right understanding of any statute, and yet are no part of the statute itself:

1. The consideration of the case at the common law.

2. The consideration of the mischief which the statute intendeth to redress; as also any other mischief, which an exposition of the statute this way or that way may breed.

3. Certain maxims of the common law, touching exposition of statutes.

Having therefore framed six divisions, according to the number of readings, upon the statute itself, I have likewise divided the matter without the statute into six introductions or discourses; so that for every day's reading I have made a triple provision:

1. A preface or introduction.

2. A division upon the law itself.

3. A few brief cases for exercise and argument.

The last of which I would have forborn, and, according to the ancient manner, you should have taken some of my points upon my divisions, one, two, or more, as you had thought good; save that I had this regard, that the younger sort of the bar were not so conversant in matters upon the statutes; and for their ease I have interlaced some matters at the common law, that are more familiar within the books.

1. The first matter I will discourse unto you is the nature and definition of an use, and its inception and progression before the statute.

2. The second discourse shall be of the second spring of this tree of uses since the statute, after[1] it was lopped and ordered by the statute.

3. The third discourse shall be of the estate of the assurances of the realm at this day upon uses, and what kind of them is convenient and reasonable and not fit to be shaken or touched, as far as the sense of law and a natural construction of the statute will give leave; and what kind of them is inconvenient and meet to be suppressed.

4. The fourth discourse shall be of certain rules of expositions of laws applied to the present purpose.

5. The fifth discourse shall be of the best course to remedy

[1] Omitted in the editions and MS. 1858.

the inconveniences now a foot by construction of the statute, without offering violence to the letter or sense.

6. The sixth and last discourse shall be of the best course to remedy the same inconveniences and to declare the law by act of parliament: which last I think good to reserve, and not to publish.

Nature and definition of an use.

The nature of an use is best discerned by considering, first, what it is not; and then what it is: for it is the nature of all human science and knowledge to proceed most safely by negative and exclusion, to what is affirmative and inclusive.

First, therefore, an use is no right, title, or interest in law; and therefore Mr. Attorney[1], who read upon this statute, said well, that there are but two rights: *Jus in re: Jus ad rem.* The one is an estate, which is *Jus in re:* the other a demand, which is *Jus ad rem.* But an use is neither: so that in 24 H. VIII. it is said that the saving of the statute of 1 R. III., which saveth any right or interest of intails, must be understood of intails of the possession, and not of the use, because an use is no right nor interest; so again, you see Littleton's conceit, that an use should amount to a tenancy at will whereupon a release might well inure because of privity, is controlled by 5 H. VII. 5. and divers other books, which say that *cestui que use* is punishable in trespass towards the feoffees. Only 5 H. V. 3. seemeth to be at some discord with other books, where it is admitted for law, that if there be *cestui que use* of an advowson, and he be outlawed in a personal action, the king should have the presentment; which case Master Ewens, in the argument of Chudleigh's case, did seek to reconcile thus: where *cestui que use,* being outlawed, had presented in his own name, there the king should remove his incumbent. But no such thing can be collected upon the book, and, therefore, I do rather conceive the error grew upon this; that, because it was generally thought that an use was but a pernancy of profits, and then again, because the law is that upon outlawries upon personal actions the king shall have the pernancy of profits, they took that to be one and the selfsame thing which *cestui que use* had, and which the

Br. Feoff. al uses, pl. 40.

Sec. 462, &c.

15 H. 7. 2. & 13.

Br. Presentation al Eglise pl. 16., and Forfeiture, pl. 14.

[1] Coke, who read at the Inner Temple in 1592. He repeats the phrase in his Report of Chudleigh's Case, 1 Rep. 121.: and one may well suppose we have there some fragments of his reading worked up into the argument.

king was entitled unto: which was not so; for the king had remedy in law for his pernancy of the profits, but *cestui que use* had none.

The books go farther, and say that an use is nothing. As in 2 H. VII. 4. debt was brought and the plaintiff counted upon a demise for years rendering rent, &c.; the defendant pleaded in bar, that the plaintiff *nihil habuit tempore dimissionis;* the plaintiff made a special replication, and showed that he had an use, and issue joined upon that: whereby it appeareth that if he had taken issue upon the defendant's plea, it should have been found against him. So again in 4 Reginæ, in the case of the Lord Sandys, the truth of the case was, a fine was levied by *cestui que use* before the statute, and this coming in question since the statute, upon an averment by the plaintiff *quod partes finis nihil habuerunt,* it is said that the defendant may show the special matter of the use, and it shall be no departure from the first pleading of the fine; and it is said farther, that the form of averment given in 4 H. VII. *quod partes finis nihil habuerunt, nec in possessione, nec in usu,* was ousted by this statute of 27 H. VIII. and was no more now to be accepted; but yet it appears that if issue had been taken upon the general averment, without the special matter showed, it should have been found for him that took the averment, because an use is nothing. Dyer, 215.

But these books are not to be taken generally or grossly; for we see in the same books, that when an use is specially alleged, the law taketh knowledge of it. But the sense of it is, that an use is nothing for which any remedy is given by the course of the common law; so as the law knoweth it, but protects it not: and, therefore, when the question cometh, whether it hath any being in nature or in conscience, the law accepteth of it; and therefore Littleton's case is good law, that he that hath but forty shillings freehold in use, shall be sworn of an inquest, for that is ruled *secundum dominium naturale,* and not *secundum dominium legitimum; nam natura dominus est, qui fructum ex re percipit.* And so, no doubt, upon subsidies and taxes *cestui que use* should have been valued as an owner: so, likewise, if *cestui que use* had released his use unto the feoffee for six pounds, or contracted with a stranger for the like sum, there was no doubt but it was a good consideration whereon to ground an action upon the case for the money: for the release of a suit in the Chancery is a good *quid pro quo.* Therefore, to conclude, Sec. 464.

though an use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and in conscience: for that may be somewhat in conscience which is nothing in law, like as that may be something in law which is nothing in conscience; as, if the feoffees had made a feoffment over in fee *bona fide* upon good consideration, and upon a *subpœna* brought against them they pleaded this matter in Chancery, this had been nothing in conscience, not as to discharge them of damages.

A second negative fit to be understood is, that an use is no covin; nor it is no confidence[1] as the word is now used.

For it is to be noted that where a man doth remove the estate and possession of lands or goods out of himself unto another upon trust, it is either a special trust, or a general trust.

The special trust, again, is either lawful, or unlawful.

The special trust unlawful appears in the cases provided for by ancient statutes of pernors of the profits; as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the *præcipe*, or the statute of mortmain, or the lords of their wardships, or the like. And these are termed frauds, covins, or collusions.

The special trust lawful is as when I infeoff some of my friends because I am to go beyond the seas, or because I would free the land from some statute or bond which I am to enter into, or upon intent to be reinfeoffed, or upon intent to be vouched and so to suffer a common recovery, or upon intent that the feoffees shall infeoff over a stranger, and infinite the like intents and purposes which fall out in men's dealings and occasions. And this we call confidence, and the books do call them intents.

But where the trust is not special, nor transitory, but general and permanent, there it is an use. And therefore these three are to be distinguished, and not confounded: the covin, the confidence, and the use.

Plowd. 352. So as now we are come by negatives to the affirmative, what an use is; agreeable to the definition in Delamer's case, where it is said: an use is a trust reposed by any person in the terre-tenant, that he may suffer him to take the profits, and that he

[1] So Harl. MS. 6688. The common reading is "collusion." Bacon is describing and distinguishing three things; the "covin," the "confidence," which are special trusts, and the "general trust," or use.

will perform his intent. But it is a shorter speech to say, that *usus est dominium fiduciarium:* Use is an ownership in trust.

So that *usus et status, sive possessio, potius differunt secundum rationem fori, quam secundum naturam rei,* for what one is in course of law, the other is in course of conscience. And for a trust, which is *genus*[1] to the use, it is exceedingly well defined by Azo, a civilian of great understanding: *Fides est obligatio conscientiæ unius ad intentionem alterius.* And they have a good division likewise of rights: *Jus precarium: Jus fiduciarium: Jus legitimum:* a right in courtesy, for the which there is no remedy at all: a right in trust, for which there is a remedy, but only in conscience: a right in law.

So much of the nature and definition of an use.

The parts and properties of a use.

It followeth to consider the parts and properties of an use: wherein it appeareth by the consent of all books, and it was distinctly delivered by Justice Walmsley in 36 of Elizabeth: that the[2] trust consisteth upon three parts:

The first, that the feoffee will suffer the feoffor to take the profits: the second, that the feoffee upon the request of the feoffor, or notice of his will, will execute the estate to the feoffor, or his heirs, or any other by his direction: the third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will reenter, or bring an action to recontinue the possession. So that these three, pernancy of profits, execution of estates, and defence of the land, are the three points of the trust.

For the properties of an use, they are exceeding well set forth by Fenner, Justice, in the same case; and they be three:

Uses, saith he, are created by confidence; preserved by privity (which is nothing else but a continuance of the confidence without interruption); and ordered and guided by conscience, either by the private conscience of the feoffee, or the general conscience of the realm, which is Chancery.[3]

The two former of which, because they be matters more thoroughly beaten and we shall have occasion hereafter to handle them, we will not now dilate upon: but the third we will speak somewhat of; both because it is a key to open many

[1] So Harl. MS. 6688. The common reading is "the way."

[2] So Harl. MS. 6688. instead of "a:" *i. e.* the trust which the feoffee is bound to perform.

[3] These passages from the judgments of Walmsley and Fenner do not appear elsewhere.

of the true reasons and learnings of uses, and because it tendeth to decide our great and principal doubts at this day. [1]

Coke, Solicitor, entering into his argument of Chudleigh's case, said sharply and fitly [2]: "I will put never a case but it shall be of an use, for an use in law hath no fellow;" meaning, that the learning of uses is not to be matched with other learnings. And Anderson, Chief Justice, in the argument of the same case, did truly and profoundly control the vulgar opinion, collected upon 5 E. IV. 7. that there might be *possessio fratris* of an use; for he said that it was no more but that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear. And therefore the private conceit, which Glanvile, Justice, cited in 42 Reginæ, in the case of Corbet [3] in the Common Pleas, of one of Lincoln's Inn, (whom he named not, but seemed well to allow of the opinion,) is not sound; which was, that an use was but an imitation and did ensue the nature of a possession.

Br. Descent, 36.

1 Rep. 88.

27 H. 8. 9, 10. This very conceit was set on foot in 27 H. VIII. in the Lord Dacre's case, in which time they began to heave at uses. For there, after the realm had many ages together put in ure the passing of uses by will, they began to argue that an use was not devisable, but that it did ensue the nature of the land. And the same year, after, this statute was made; so that this opinion seemeth ever to be a prelude and forerunner to an act of Parliament touching uses: and if it be so meant now, I like it well; but in the meantime the opinion itself is to be rejected.

And because, in the same case of Corbet, three reverend judges of the court of Common Pleas did deliver and publish their opinion (though not directly upon the point adjudged, yet *obiter* as one of the reasons of their judgment), that an use of inheritance could not be limited to cease; and again, that the limitation of a new use could not be to a stranger—ruling uses merely according to the ground of possession—it is worth the labour to examine that learning.

Br. Feoff. al uses, 21. By 3 H. VII. 13. you may collect, that if the feoffees had

[1] See Note B. at the end.

[2] I suppose the passage is represented in Coke's own report at the beginning of p. 123. by the parenthesis, "for the treatise shall be only of uses."

[3] In Coke's report, 1 Rep. 88., the opinion is given as Glanville's, without allusion to the Lincoln's Inn man. Coke represents the judgment to have been given in Easter Term, which was after this Reading; and, if so, we must suppose this passage to have been subsequently inserted. But the Pleadings show a judgment in Hilary Term and afterwards a writ of error: so that it seems possible Coke's Report may be, wholly or in part, of the judgment delivered just before Bacon's Reading.

been disseised by the common law, and an ancestor collateral of *cestui que use* had released unto the disseisor, and his warranty had attached upon *cestui que use;* yet the chancellor, upon this matter showed, would have no respect unto it, to compel the feoffees to execute the estate unto the disseisor: for there, the case being that *cestui que use* in tail made an assurance by fine and recovery and by warranty which descended upon his issue, two of the judges hold that the use is not extinct; and Bryan and Hussey, that held the contrary, said that the law is altered by the new statute; whereby they admit that by the common law a warranty will not bind and extinct a right of an use, as it will do a right of possession: and the reason is, because the law of collateral warranty is a hard law, and not to be considered in a court of conscience. In 5 E. IV. 7. it is said, "if *cestui que use* be attainted, *quere* who shall have the land; for the lord shall not have it": so as there the use doth not imitate the possession. And the reason is not because the lord hath a tenant in by title, for that is nothing to the *subpœna*, but because the feoffor's intent was never to advance the lord, but only his own blood; and therefore the *quere* of the book ariseth, what the trust and confidence of the feoffee did tie him to do, as, whether he should not sell the land to the use of the feoffor's will, or *in pios usus?* So favourably they took the intent in those days, as you may find in 37 H. VI., that if a man had appointed his use to one for life, the remainder in fee to another, and *cestui que use* for life had refused; because the intent appeared not to advance the heir at all, nor him in remainder presently, therefore the feoffee should make the estate for life of him that refused some ways to the behoof of the feoffor.

Br. Feoffm. al uses, 34.

Fitz. Subp. 1. Br. Conscience, 5

But to proceed in some better order towards the disproof of this opinion of imitation, there be four points wherein we will examine the nature of uses: the raising of them; the preserving of them; the transferring of them; the extinguishing of them. And in all these four you shall see apparently that uses stand upon their own reasons, utterly differing from cases of possession.

1. I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration. As for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of

Sherrington v. Stratton, Plowd. 298. 309.

it: and therefore in 8 Reginæ it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of consideration doth never hurt it. And yet they say that an use is but a nimble and light thing; and now, contrariwise, it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed nor deed inrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason of chancery, and it is this: that no court of conscience will inforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed, or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the chancery. So again I would see in all the law a case, where a man shall take by conveyance, be it by deed, livery, or word, that is not party to the grant: I do not say that the delivery must be to him that takes by the deed, for a deed may be delivered to one man to the use of another: neither do I say that he must be party to the livery or deed, for he in the remainder may take though he be party to neither: but he must be party to the words of the grant. Here again the case of the use goeth single: and the reason is, because a conveyance in use is nothing but a publication of the trust; and therefore, so as the party [1] trusted be declared, it is not material to whom the publication be.

So much for the raising of uses. Now as to the preserving of them.

2. There is no case in the common law wherein notice simply and nakedly is material to make a covin, or *particeps criminis*. And therefore if the heir which is in by descent infeoff one which had notice of the disseisin, if he were not a *disseisor de facto*, it is nothing: so in 33 H. VI. 14. if a feoffment be made upon collusion, and feoffee makes a feoffment over upon good consideration; the collusion is discharged, and it is not material whether the second feoffee had notice or no. So, as it is put in 14 H. VIII. 8., if a sale be made in a market overt upon good

[1] I understand "the party trusted," as a translation of *cestui que in trust*, as we have elsewhere "estated," for "in of an estate." Harl. MS. 6688. altogether omits the reason given in the lines above, and has here "the party's trust be declared and accepted": which I think must be a conjectural and erroneous correction.

consideration, although it be to one that hath notice that they are stolen goods, yet the property of a stranger is bound; though in the book before remembered, 35 H. VI. there be some opinion to the contrary, which is clearly no law. So in 31 E. III. if assets descend to the heir, and he alien it upon good consideration, although it be to one that had notice of the debt or of the warranty, it is good enough. So 25 Ass. pl. 1., if a man enter of purpose into my lands, to the end that a stranger which hath right should bring his *præcipe* and evict the land, I may enter notwithstanding any such recovery; but if he enter having notice that the stranger hath right, and the stranger likewise having notice of his entry, yet if it were not upon confederacy or collusion between them, it is nothing. And the reason of these cases is, because the common law looketh no farther than to see whether the act were merely *actus fictus in fraudem legis*; and therefore wheresoever it findeth consideration given, it dischargeth the covin.[1] But come now to the case of the use, and there it is otherwise: as it is in 14 H. VIII. 4. and 28 H. VIII. and divers other books; which prove that if the feoffee sell the land for good consideration to one that hath notice, the purchaser shall stand seised to the ancient use. And the reason is, because the chancery looketh farther than the common law, namely, to the corrupt conscience of him that will deal with the land knowing it in equity to be another's; and therefore, if there were *radix amaritudinis*, the consideration purgeth it not, but it is at the peril of him that giveth it. So that consideration, or no consideration, is an issue at the common law; but notice, or no notice, is an issue in the chancery. And so much for the preserving of uses.

Br. Collusion and covin, 4.

Br. Feoffm. al uses, 10. Dyer, 7 *b.* to 13 *a.*

3. For the transferring of uses. There is no case in law where an action may be transferred; but the *subpœna* in case of use was always assignable. Nay, farther, you find twice, 27 H. VIII. fol. 20. pla. 9. and fol. 29. pla. 21. that a right of use may be transferred. For in the former case Montague maketh an objection, and saith that a right of use cannot be given by fine, but to him that hath the possession; Fitzherbert answereth, "Yes, well enough;" *quere* the reason, saith the book. And in the latter case, where *cestui que use* was infeoffed by the disseisor of the feoffee and made a feoffment over, Englefield

[1] As Mr. Rowe has pointed out, the cases do not fully bear Bacon out.

doubted whether the second feoffee should have the use: Fitzherbert said, "I marvel you will make a doubt of it, for there is no doubt but the use passeth by the feoffment to the stranger, and therefore this question needed not to have been made."

Plowd. 346. So the great difficulty in 10 Reginæ, Delamer's case: where the case was in effect, there being tenant in tail of an use, the remainder in fee, tenant in tail made a feoffment in fee by the statute of 1 R. III. and that feoffee infeoffed him in the remainder of the use, who made a feoffment over; and there, question being made, whether the second feoffee should have the use in remainder, it is said that the second feoffee must needs have the best right in conscience; because the first feoffee [1] claimeth nothing but in trust, and the *cestui que use* cannot claim it against his sale: but the reason is apparent (as was touched before) that an use in *esse* was but a thing in action, or in suit to be brought in court of conscience, and whether the *subpœna* was to be brought against the feoffee in possession to execute the estate, or against the feoffee out of possession to recontinue the estate, always the *subpœna* might be transferred; for still the action at the common law was not stirred, but remained in the feoffee; and so no mischief of maintenance or transferring rights.

And if an use, being but a right, may be assigned and passed over to a stranger, *a multo fortiori* it may be limited to a stranger upon the privity of the first conveyance, as shall be handled in another place. And as to what Glanvile, Justice, said, that he could never find, neither by book nor evidence of any antiquity, a contingent use limited over to a stranger; I answer, first, it is no marvel that you find no case before E. IV. his time, of contingent uses, where there be not six of uses at all; and the reason, no doubt, was, because men did choose well whom they trusted, and trust was well observed. And at this day in Ireland, where uses be in practice, cases of uses come seldom in question; except it be sometimes upon the alienations of tenants in tail by fine, that the feoffees will not be brought to execute estates to the disinheritance of the ancient blood. But for experience of contingent uses, there was nothing more usual in *obits* than to will the use of the land to certain persons and their heirs so long as they shall pay the chantry

[1] *i. e.* the original feoffee to uses.

priests their wages, and in default of payment to limit the use over to other persons and their heirs, and so in course of forfeiture, through many degrees: and such conveyances are as ancient as R. II. his time.

4. Now for determining and extinguishing of uses, I put the case of collateral warranty before. Add to that, the notable case 14 H. VIII. 4. Halfpenny's case, where this very point was in the principal case. For a rent out of land and the land itself, in course of possession, cannot stand together, but the rent shall be extinct; but there the case is, that the use of the land and the use of the rent may stand well enough together: for a rent charge was granted by the feoffee to one that had notice of the use; and ruled, that the rent was to the ancient use, and both uses were *in esse simul et semel;* and though Brudenell, Chief Justice, urged the ground of possession to be otherwise, yet he was overruled by other three justices; and Brooke said unto him, he thought he argued much for his pleasure. Br. Feoffm. al uses, pl. 10

And[1] to conclude, we see that things may be avoided and determined by ceremonies and acts like unto those by which they are created and raised: that which passeth by livery ought to be avoided by entry; that which passeth by grant, by claim; that which riseth by way of charge, determineth by way of discharge; and so an use, which is raised but by a declaration or limitation may cease by words of declaration or limitation. As the civilian saith, *nihil magis consentaneum est, quam ut iisdem modis res dissolvantur quibus constituuntur.*

Inception and progression of uses before the statute.

For the inception and progression of uses, I have, for a precedent of them, searched other laws; because states and commonwealths have common accidents. And I find in the civil law, that that which cometh nearest in name to the use is nothing like in matter, which is *usus fructus;* for *usus fructus* and *dominium* is with them, as with us particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio;* and therefore you shall find, in Institut. lib. 2., that they had a form in testaments to give inheritance to one to the use of another, *Hæredem constituo Caium: rogo autem te, Caie, ut hæreditatem restituas Seio.* And the text of the civilians saith Tit. 23.

[1] Something seems wrong here, though all the editions and MSS. substantially agree. Either some intermediate cases are omitted, or, as I rather suspect, this paragraph belongs to some other part of the reading, and has slipt in here by mistake. The copy Mr. B. Montagu prints from has a reference to Digge's case, 1 Rep. 173.

that for a great time, if the heir did not as he was required, *cestui que use* had no remedy at all, until that about the time of Augustus Cæsar there grew in custom a flattering form of trust: for they penned it thus; *Rogo te per salutem Augusti*, or, *per fortunam Augusti*, &c.: whereupon Augustus taking the breach of trust to sound in derogation of himself, made a rescript to the *prætor* to give remedy in such cases. Whereupon, within the space of a hundred years these trusts did spring and spread so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei commissarius;* and not long after, the inconvenience of them being found, they resorted to a remedy much like unto this statute; for, by two decrees of senate, called *senatus consultum Trebellianum et Pegasianum*, they made *cestui que use* to be heir in substance.

I have sought likewise whether there be any thing which maketh with them in our law; and I find that Periam, Chief Baron, in the argument of Chudleigh's case, compareth them to copyholders. And aptly for many respects: First, because as an use seemeth to be an hereditament in the court of chancery, so the copyhold seemeth to be an hereditament in the lord's court: Secondly, this conceit of imitation hath been troublesome in copyholds, as well as in uses; for it hath been of late days questioned, whether there should be dower, tenancy by the courtesy, intails, discontinuances, and recoveries of copyholds, in the nature of inheritances at the common law; and still the judgments have weighed, that you must have particular customs in copyholds, as well as particular reasons of conscience in use, and the imitation rejected: And thirdly, because they both grew to strength and credit by degrees; for the copyhold at first had no remedy at all against the lord, but was as a mere tenancy at will; afterwards it grew to have remedy in chancery, and afterwards against the lords by trespass at the common law; and now lastly the law is taken by some, that they have remedy by *ejectione firmæ*, without a special custom of leasing. So no doubt in uses, at the first the chancery made question to give remedy, until uses grew more general, and the chancery more eminent; and then they grew to have remedy in conscience: but they could never maintain any manner of remedy at the common law, neither against the feoffee, nor against strangers; but the remedy against the

feoffee was left to the *subpœna*, and the remedy against strangers to the feoffee.

Now for the causes whereupon uses were put in practice. Mr. Coke, in his Reading, doth say well, that they were produced sometimes for fear, and many times for fraud; but I hold that neither of these causes were so much the reasons of uses as another reason in the beginning, which was, that the lands by the common law of England were not testamentary or devisable; and, of late years, since the statute, the ease of the conveyance, for sparing of repurchases and execution of estates; and now, last of all, an excess of will in men's minds, affecting to have assurances of their estates and possessions to be revocable in their own times, and too irrevocable after their own times.

Now for the commencement and proceeding of them, I have considered what it hath been in course of common law, and what it hath been in course of statute.

For the common law, the conceit of Shelley, in 24 H. VIII., and of Pollard, in 27 H. VIII., seemeth to me to be without ground; which was, that the use did succeed the tenure: for after that the statute of *Quia emptores terrarum*, which was made 18 E. I., had taken away the tenure between the feoffor and the feoffee, and left it to the lord paramount, they said that the feoffment, being then merely without consideration, should therefore intend an use to the feoffor. Which cannot be; for, by that reason, if the feoffment before the statute had been made *tenendum de capitalibus dominis*, as it might be, there should have been an use unto the feoffor before that statute. And again, if a grant had been of such things as consist not in tenure, as advowsons, rents, villains, and the like, there should have been an use of them: wherein the law was quite contrary; for after the time that uses grew common, yet it was, nevertheless, a great doubt whether things that did lie in grant did not carry a consideration in themselves because of the deed. And therefore I do judge that the intendment of an use to the feoffor where the feoffment was without consideration grew long after, when uses waxed general; and for this reason: because when a feoffment was made, and that it rested doubtful whether it were in use or in purchase; because purchases were things notorious and trusts were things secret, the chancellor thought it more convenient to put the purchaser

Bro. Feoffm. al use, pl. 40.

to prove his consideration than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof upon the purchaser.

And therefore, as uses were at the common law in reason, (for whatsoever is not by statute, nor against law, may be said to be at the common law,) and both the general trust and the special were things not prohibited by law, though they were not remedied by law: so the experience and practice of uses were not ancient. And my reasons why I think so are these four:

First, I cannot find in any evidence before King R. II. his time the clause *ad opus et usum.*[1] And the very Latin of it savoureth of that time: for in ancient time, about E. I. and before, when lawyers were part civilians, the Latin phrase was much purer; as you may see partly by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin: whereas this phrase *ad opus et usum*, as to the words *ad opus*, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he found *opus* and *usus* coupled together, that they did govern an ablative case; as they do indeed since this statute, for they take away the land and put them into a conveyance.

Secondly, I find in no private act of attainder, in the clause of forfeiture of lands, the words, "which he hath in possession or in use," until about Ed. IV.'s reign.

Thirdly, I find the word "use" in no statute until 7 R. II. cap. 11. of provisors, and in 15 R. II. of mortmain.

Fitz. Abr. Subpœn. 8. Fourthly, I collect out of Choke's speech in 8 E. IV. 5. (where he saith that, by the advice of all the judges, it was thought that the *subpœna* did not lie against the heir of the feoffee which was in by law, but *cestui que use* was driven to bill in parliament,) that uses even in that time were but in their infancy. For no doubt at the first the chancery made difficulty to give any remedy at all, and did leave it to the particular conscience of the feoffee: but after the chancery grew absolute, (as may appear by the statute of 15 H. VI. c. 4. that complainants in chancery should enter into bond to prove their suggestions, which showeth that the chancery at that time began to em-

[1] Mr. Rowe cites Dyer, 160 *a.* and 295 *a.* as authority for a case in 24 Ed. III. where the phrase "a son œps demesne" occurs.

brace too far, and was used for vexation.) yet, nevertheless, it made scruple to give remedy against the heir, being in by act in law, though he were privy. So that it cannot be that uses had been of any great continuance when they made that question. As for the *causâ matrimonii prælocuti*[1], it hath no affinity with uses; for wheresoever there was remedy at the common law by action, it cannot be intended to be of the nature of an use. And for the book commonly vouched of 8 Ass. where Herle calleth the possession of a conuzee upon a fine levied by consent "an entry in *auter droit*," and 44 E. III. where there is mention of feoffors that sued by petition to the King, they be but implications of no moment. So as it appeareth that the first practice of uses was about R. II.'s time, and the great multiplying and overspreading of them was partly during the wars in France, which drew most of the nobility to be absent from their possessions, and partly during the time of the trouble and civil wars between the two houses about the title of the crown.

Bro. Feoff. al use, 20. and 9.

Now to consider the progression of uses in course of statutes, I do note three special points:

First, that an use had never any force at all at the common law, but by statute law.

Secondly, that there was never any statute made directly for the benefit of *cestui que use*, as that the descent of an use should toll an entry, or that a release should be good to the pernor of the profits, or the like; but always for the benefit of strangers and other persons against *cestui que use* and his feoffees: for though by the statute of R. III. he might alter his feoffee, yet that was not the scope of the statute, but to make good his assurances to other persons; and the other came in *ex obliquo*.

[2] Thirdly, that the special intent unlawful and covinous was the original of uses, though after it induced to the lawful intents general and special.

For 50 E. III. is the first statute I find wherein mention is made of the taking of profits by one, where the estate in law is in another. For as for the opinion in 27 H. VIII. 8. that in case of the statute of Marlebridge the feoffor took the profits, it is but a conceit: for the law is at this day, that if a man infeoff his eldest son, within age and without consideration,

Bro. Feoff. al use, 4.

[1] Compared with an use in Lord Dacre's case, cited *supra*.
[2] See Note C. at the end.

although the profits be taken to the use of the son, yet it is a feoffment within the statute. And for the statute *De Religiosis* 7 E. I. though it prohibits generally that religious persons shall not purchase *arte vel ingenio*, yet it maketh no mention of an use; but it saith "*colore donationis, termini, vel alicujus tituli*," reciting these three forms of conveyances, the gift, the long lease, and the feigned recovery; which gift cannot be understood of a gift to a stranger to their use, for that came to be holpen by 15 R. II. long after.

But to proceed: in 50 E. III. c. 6. a statute was made for the relief of creditors against such as made covinous gifts of their lands and goods and conveyed their bodies into sanctuaries, there living high upon other men's goods; and therefore that statute made their lands liable to their creditors' executions in that particular case, if they took the profits. In 1 R. II. c. 9. a statute was made for relief of those as had right of action against such as had removed the tenancy of the *præcipe* from them, sometimes by infeoffing great persons for maintenance, and sometimes by secret feoffments to others whereof the demandants could have no notice; and therefore the statute maketh the recovery good in all actions against the first feoffors, so as they took the profits, and so as the demandants bring their action within a year of their expulsion. In 2 R. II. sess. 2. cap. 3. an imperfection in the statute of 50 E. III. was holpen; for whereas the statute took no place but where the defendant appeared, and so was frustrated, this statute giveth, upon proclamation made at the gate of the place privileged, that the land should be liable without appearance. In 7 R. II. cap. 12. a statute was made for the restraint of aliens to take any benefices or dignities ecclesiastical, or farms or administration of them, without the king's special license, upon pain of the statute of provisors: which, being remedied by a former statute where the alien took it to his own use, is by that statute remedied where the alien took it to the use of another, as it is printed in the book; though I guess[1] that, if the record were searched, it should be, "if any other purchased to the use of an alien," and that the words, "or to the use of another," should be, "or any other to his use." In 15 R. II. cap. 5. a statute was made for the relief of lords against mort-

[1] This guess is not confirmed by the Record Commission.

main, where feoffments were made to the use of corporations; and an ordinance made that, for feoffments past, the feoffees should, before a day, either purchase license to amortise them, or alien them to some other use, and, for feoffments to come, they should be within the statute of mortmain. In 4 H. IV. cap. 7. the statute of 1 R. II. is enlarged in the limitation of time; for whereas that statute did limit the action to be brought within the year of the feoffment, this statute, in the case of disseisin, extends the time to the life of the disseisor, and in all other actions leaves it to the year from the time of the action grown. In 11 H. VI. cap. 3. that statute of 4 H. IV. is declared; because the conceit was, upon that statute, that in case of disseisin the limitation of the life of the disseisor went only to the assize of *novel disseisin*, and to no other action: and therefore this statute declareth the former law to extend to all other actions grounded upon *novel disseisin*. In 11 H. VI. cap. 5. a statute was made for relief of him in remainder against particular tenants, for lives or years, that assigned over their estates, and took the profits, and then committed waste; and therefore this statute giveth an action of waste against them, being pernors of profits.

In all this course of statutes no relief is given to purchasers that come in by the party, but to such as come in by law: as demandants in *præcipes*, whether they be creditors, disseisees, or lessors, and lords[1] (and that only in case of mortmain). And note also, that they be all in cases of special covinous intents; as, to defeat executions, tenancy to the *præcipe*, and the statute of mortmain, or provisors.

From 11 H. VI. to 1 R. III. being a space of fifty years, there is a silence of uses in the statute book, which was at that time when, no question, they were favoured most. In 1 R. III. cap. 1. cometh the great statute for the relief of those that come in by the party: and at that time an use appeareth in his likeness; for there is not a word spoken of any taking of the profits, to describe a use by, but of claiming to an use. And this statute ordained that all feoffments, gifts, grants, &c. shall be good against the feoffors, donors, and grantors, and all other persons claiming only to their use: so as here the

[1] Both Harl. MSS. give this reading, which has been omitted or blundered in all the Editions, and No. 6688. gives the obvious correction of "demandant" for "defendant" above.

purchaser was fully relieved; and *cestui que use* was *obiter* enabled to change his feoffees, because there were no words in the statute of feoffments, grants, &c. upon good consideration, but generally. In H. VII.'s time new statutes were made for further help and remedy to those that came in by act in law; as 1 H. VII. cap. 1. a *formedon* is given without limitation of time against *cestui que use;* and *obiter,* because they make him tenant, they give him the advantage of a tenant, as of age and voucher over. 4 H. VII. cap. 17. the wardship of the heir of *cestui que use* dying, and no will declared, is given to the lord as if he had died seised in demesne; and *reciprocè* action of waste given to the heir against the guardian, and damages if the lord were barred in his writ of ward; and relief is likewise given unto the lord, if the heir, holding by knight service, be of full age. In 19 H. VII. cap. 15. there is relief given in three cases: first, to the creditors upon matter of record, as upon recognisance, statute, or judgment, whereof the two former were not aided at all by any statute, and the last was aided by the statutes of 50 E. III. and 2 R. II. only in cases of sanctuary men; secondly, to the lords in socage for their reliefs and heriots upon death, which was omitted in the 4 H. VII.; and lastly, to the lords of villains, upon the purchase of their villains in use. In 23 H. VIII. cap. 10. a further remedy was given in a case like unto the case of mortmain. For in the statute of 15 R. II. remedy was given where the use came *ad manum mortuam,* which was when it came to some corporation: now, when uses were limited to a thing apt or worthy [1], and not to a person or body,—as to the reparation of a church, or an *obit,* or to such guilds or fraternities as are only in reputation and not incorporate, as to parishes,—the case was omitted; which by this statute is remedied, not by way of giving entry unto the lord, but by way of making the use utterly void. Neither doth the statute express to whose benefit the use shall be made void, either the feoffor or feoffee, but leaveth it to law, and addeth a *proviso* that uses may be limited twenty years from the gift, and no longer.

[1] This is the reading of Mr. Montagu's text, also of Harl. MS. 6688., which latter seems to me the most trustworthy we have. The common reading is "act, or work," which some may prefer. The general sense is not affected. For "parishes," below, the MS. reads "priests."

This is the whole course of the statute law touching uses, before this statute. And thus have I set forth unto you the nature and definition of an use; the differences of trusts, the parts of an use, and the qualities of it, and by what rules and learning uses shall be guided and ordered; a precedent of them in other laws, and some resemblance of them in our law; the causes of the springing and spreading of uses; the continuance of them; and the proceeding that they have had both in common and statute law. Whereby it may appear, that an use is no more but a general trust, when a man will trust the conscience of another better than his own estate and possession; which is an accident or event of human society which hath been and will be in all laws, and therefore was at the common law which is common reason. For as Fitzherbert saith in the 14 H. VIII. 4. common reason is common law, and not conscience; but common reason doth define that uses should be remedied in conscience and not in courts of law, and ordered by rules in conscience and not by strait cases of law; for the common law hath a kind of a rule and survey over the chancery, to determine what belongs to the chancery. And therefore we may truly conclude, that the force and strength that an use had or hath in conscience is by common law; and the force that it had or hath by common law is only by statutes.

THE OPENING OF THE STATUTE.

Now followeth, in time and matter, the consideration of this statute, which is our principal labour; for those former considerations which we have handled serve but for introduction.

This statute, as it is the statute which of all others hath the greatest power and operation over the inheritances of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet itself is the most perfectly and exactly conceived and penned of any law in the book, induced with the most declaring and persuading preamble, consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes, and lastly, the best pondered in all the words and clauses of it of any statute that I find.

But before I come to the statute itself, I will note unto you three matters of circumstance: 1. the time of the statute: 2. the title of it: 3. the precedent or pattern of it.

1. For the time, it was made in 27 H. VIII. when the kingdom was in full peace and a wealthy and flourishing estate; in which nature of time men are most careful of the assurances of their possessions, as well because purchases are most stirring as, again, because the purchaser, when he is full, is no less careful of his assurance to his children and of disposing that which he hath gotten, than he was of his bargain and compassing thereof.

About that time likewise the realm began to be enfranchised from the tributes of Rome, and the possessions that had been in mortmain began to stir abroad; for this year was the suppression of the smaller houses of religion: all tending to plenty and purchasing. And this statute came in consort with divers excellent statutes made for the kingdom in the same parliament; as the reduction of Wales to a more civil government, the reedifying of divers cities and towns, the suppressing of depopulation and inclosures; all badges of a time that did extraordinarily flourish.

For the title, it hath one title in the roll, and another in course of pleading. The title in the roll is no solemn title, but an apt title, viz. An act expressing an order for uses and wills; — it was time, for they were out of order. The title in course of pleading is, *Statutum de usibus in possessionem transferendis.* Wherein Walmsly, Justice, noted well, 40 Reginæ, that if a man look to the working of the statute he would think it should be turned the other way, *de possessionibus ad usus transferendis;* for that is the course that the statute holdeth, to bring possession to the use. But the title is framed not according to the working of the statute, but according to the scope and intention of the statute; *nam quod primum est intentione ultimum est opere;* and the intention of the statute was by carrying the possession to the use to turn the use into a possession. For the words are not *de possessionibus ad usus*, but *in usus transferendis;* and as the grammarian saith, *præpositio "ad" denotat motum lationis, sed præpositio "in" cum accusativo denotat motum alterationis;* and therefore Kingsmill, Justice, in the same case, saith that the meaning of the statute was to make a transubstantiation of the use into a possession. But it is to be noted that titles of acts of parliament, severally, came in but in 5 H. VIII.; for before that time there was but one title of all the acts made in one parliament; and that was no title neither, but a general preface of the good intent of the King, but now it is parcel of the record.

For the precedent of this statute upon which it is drawn, I do find it 1 R. III. c. 5., where you may see the very mould whereon this statute was made; where the said King having been infeoffed, before he usurped, to uses, it was ordained that the land whereof he was jointly infeoffed should be in his cofeoffees as if he had not been named; and where he was solely infeoffed, it should be in *cestui que use*, in estate, as he had the use.

Now to come to the statute itself.

The statute consisteth, as other laws do, upon a preamble, the body of the law, and certain savings and provisoes. The preamble setteth forth the inconvenience; the body of the law giveth the remedy; and the savings and provisoes take away the inconveniences of the remedy. For new laws are like the apothecaries' drugs; though they remedy the disease, yet they

trouble the body: and therefore they use to correct them with spices. So it is not possible to find a remedy for any mischief in the commonwealth, but it will beget some new mischief; and therefore they spice their laws with provisoes to correct and qualify them.

The Preamble.

The preamble of this law was justly commended by Popham, Chief Justice, in 36 Reginæ, where he saith that there is little need to search and collect out of cases before the statute what the mischief was which the scope of the statute was to redress; because there is a shorter way offered us, by the sufficiency and fulness of the preamble. And because it is indeed the very level which doth direct the very ordinance of the statute, and because all the mischief hath grown by expounding of this statute as if they had cut off the body from the preamble; therefore it is good to consider it and ponder it thoroughly.

The preamble hath three parts: first, a recital of the principal inconvenience, which is the root of all the rest: secondly, an enumeration of divers particular inconveniences, as branches of the former: thirdly, a taste or brief note of the remedy that the statute meaneth to apply.

The principal inconvenience, which is *radix omnium malorum*, is the digressing from the grounds and principles of the common law, by inventing a means to transfer lands and inheritances without any solemnity or act notorious: so as the whole statute is to be expounded strongly towards the extinguishment of all conveyances whereby the freehold or inheritance may pass without any new confections of deeds, executions of estate, or entries; except it be where the estates be of privity and dependence one towards the other; in which case, *mutatis mutandis*, they might pass by the rules of the common law.

The particular inconveniences by the law rehearsed may be reduced to four heads: first, that these conveyances in use are weak for consideration: secondly, that they are obscure and doubtful for trial: thirdly, that they are dangerous for want of notice and publication: fourthly, that they are exempted from all such titles as the law subjecteth possession unto.

The first inconvenience lighteth upon heirs: the second upon jurors and witnesses: the third upon purchasers: the fourth upon such as come in by gift in law: all which are persons that the law doth principally respect and favour.

For the first of these, there are three impediments to the

judgment of man in disposing justly and advisedly of his estate: first, trouble of mind; secondly, want of time; thirdly, of wise and faithful counsel about him: and all these three the statute did find to be in the disposition of an use by will; whereof followed the unjust disinherison of heirs. Now the favour of the law unto heirs appeareth in many parts of the law; as the law of descent privilegeth the possession of the heir against the entry of him that hath right by the law; no man shall warrant against his heir, except he warrant against himself; and divers other cases too long to stand upon. And we see the ancient law in Glanvill's time was, that the ancestor could not disinherit his heir by grant or other act executed in time of sickness; neither could he alien land which had descended unto him except it were for consideration of money or service, but not to advance any younger brother without the consent of the heir. Gl. b. 7. ch. 1. fol. 44.

For trials, no law ever took a straiter course, that evidence should not be perplexed nor juries inveigled, than the common law of England; as, on the other side, never law took a more precise and strait course with juries, that they should give a direct verdict. For whereas in a manner all laws do give the triers, or jurors, which in other laws are called judges *de facto*, a liberty to give *non liquet*, that is, no verdict at all, and so the cause to stand abated; our law enforceth them to a direct verdict, general or special: and whereas other laws accept of plurality of voices to make a verdict, our law enforceth them all to agree in one: and whereas other laws leave them to their own time and ease, and to part and to meet again; our law doth duress and imprison them in the hardest manner, without light, or comfort, until they be agreed. In consideration of which straitness and coercion, it is consonant that the law do require, in all matters brought to issue, that there be full proof and evidence: and therefore if the matter in itself be in the nature of simple contracts, which are made by parol without writing, it alloweth wager of law; in issue upon the mere right, which is a thing hard to discern, it alloweth wager of battail to spare jurors; if time have wore out the marks and badges of truth, from time to time there have been statutes of limitation, where you shall find this mischief of perjuries often recited; and lastly, which is the matter in hand, all inheritances

could not pass but by acts overt and notorious, as by deed, livery, and record.

For purchasers *bonâ fide*, it may appear that they were ever favoured in our law: as, first, by the great favour of warranties which were ever for the help of purchasers, as where, by the law [1] in E. III.'s time, the disseisee could not enter upon the feoffee in regard of the warranty; so again the collateral warranty, which otherwise is a hard law, grew, no[2] doubt, only upon favour of purchasers; so likewise that the law doth take strictly rent charge, conditions, extents, was merely in favour of purchasers; so was the binding of fines at the common law, the invention and practice of recoveries to defeat the statute of intails; and many more grounds and learnings are to be found respecting the quiet possession of purchasers. And therefore, though the statute of 1 R. III. had provided for the purchaser in some sort, by enabling the acts and conveyances of *cestui que use*, yet, nevertheless, the statute did not at all disable the acts or charges of the feoffees; and so, as Walmsly, Justice, said, [42] Reginæ, they played at double hand, for *cestui que use* might sell, and the feoffee might sell, which was a very great uncertainty to the purchaser.

For the fourth point of inconvenience, towards those that come in by law, conveyances in uses were like privileged places or liberties: for as there the law doth not run, so upon such conveyances the law could take no hold, but they were exempted from all titles in law.

No man is so absolute owner of his possessions, but that the wisdom of the law doth reserve certain titles unto others; and such persons come not in by the pleasure and disposition of the party, but by the justice and consideration of law; and therefore of all others they are most favoured. And they are principally three: the King and lords, who lost the benefit of attainders, fines for alienations, escheats, aids, heriots, reliefs, &c.: the demandants in *præcipes*, either real, or personal for debt and damages, who lost the benefit of their recoveries and executions: and tenants in dower, and by the courtesy, who lost their estates and titles.

First for the King. No law doth endow the King or Sovereign with more prerogatives or privileges than ours: for

[1] I do not know what this refers to, unless it be to some case in the Year Book.
[2] Some editions and MSS. have "in" instead of "no."

it preserveth and exempteth his person from suits and actions, his possessions from interruption and disturbance, his rights from limitation of time, his patents from all deceits and false suggestions.

Next the King is the lord: whose duties and rights the law doth much favour, because the law supposeth the land did originally come from him; for until the statute of *Quia emptores terrarum*, the lord was not forced to distract or dismember his signiory or services. So, until 15 H. VII., the law was taken that the lord, upon his title of wardship, should oust a conuzee of a statute, or a termor. So again, we see that the statute of mortmain was made to preserve the lord's escheats and wardships.

The tenant in dower is so much favoured, as that it is the common bye-word in the law, that the law favoureth three things: life, liberty, dower. So in case of voucher, the feme shall not be delayed, but shall recover against the heir incontinent. So likewise of tenant by courtesy; it is called tenancy by the law of England, and therefore specially favoured as a proper conceit and invention of our law.

So again, the law doth favour such as have ancient rights. And therefore Littleton telleth us it is commonly said that a right cannot die: and that ground of law, that a freehold cannot be in suspense, showeth it well, insomuch that the law will rather give the land to the first comer, which we call an occupant, than want a tenant to a demandant's action: and again, the other ancient ground of law of *remitter* showeth that, where the tenant faileth without folly in the demandant, the law executeth the ancient right.

To conclude, therefore, this part: when this practice of feoffments in use did prejudice and damnify all those persons that the ancient common law favoured, and did absolutely cross the wisdom of the law, which was to have conveyances considerate and notorious, and to have trial thereupon clear and not inveigled; it is no marvel that the statute concludeth that these subtle imaginations and abuses tended to the utter subversion of the ancient common laws of this realm.

The third part of the preamble giveth a touch of the remedy which the statute intended to minister, consisting in two parts: first, the extirpation of feoffments; secondly, the taking away of the hurt, damage, and deceit of uses.

Out of which words have been gathered two extremities of opinion.

The first opinion is, that the intent of the statute was to discontinue and banish all conveyances in use: grounding themselves both upon the words, that the statute doth not speak of the extinguishment or extirpation of the use, *viz.* by an unity of possession, but of an extinguishment or extirpation of the feoffment, &c. which is the conveyance itself; and secondly, out of the words "abuses and errors, heretofore used and accustomed," as if uses had not been at the common law, but had been only an erroneous device or practice. To both which I answer: to the former, that the extirpation which the statute meant was plain to be of the feoffee's estate, and not of the form of conveyances: and to the latter I say that, for the word "abuse," that may be an abuse of the law which is not against law; as the taking long leases at this day of land *in capite* to defraud wardships is an abuse of law, but yet it is according to law: and for the word "errors" the statute meant by it, not a mistaking of the law, but a wandering or going astray or digressing from the ancient practice of the law into a bye-course: as, when we say *erravimus cum patribus nostris*, it is not meant of ignorance, but of perversity.

But to prove that the statute meant not to suppress the form of conveyances, there be three reasons which are not answerable. The first is, that the statute in every branch thereof hath words *de futuro*, "that are seised or hereafter shall be seised:" and whereas it may be said that these words were put in in regard of uses suspended by discontinuance, and so no present seisin to the use until a regress of the feoffees, that intendment is very particular; for commonly such cases are brought in by provisoes, or special branches, and not intermixed in the body of a statute, and it had been easy for the statute to have said, "or hereafter shall be seised upon any feoffment, &c. heretofore had or made."

My second reason is upon the words of the statute of inrolment, which saith, that no hereditaments shall pass, &c. or any use thereof, &c., whereby it is manifest that the statute meant to leave the form of conveyance with the addition of a farther ceremony.

The third reason I make is out of the words of the first proviso, where it is said that no primer seisin, livery, fine for

alienation, &c. shall be taken for any estate executed by force of the statute, before the first of May, 1536, but they shall be paid for uses made and executed in possession for the time after; where the word "made" directly goeth to conveyances in use made after the statute, and can have no other understanding; for the words "executed in possession" would have served for the case of regress.

And, lastly, which is more than all, if they had had any such intent, the case being so general and so plain, they would have had words express, that every limitation of use made after the statute should have been void. And this was the exposition, as tradition goeth, that a reader of Gray's Inn which read soon after the statute was in trouble for,—and worthily; who, I suppose, was Boyse[1], whose reading I could never see; but I do now insist upon it, because now again some[2], in an immoderate invective against uses, do relapse to the same opinion.

The second opinion, which I call a contrary extremity, is, that the statute meant only to remedy the mischiefs in the preamble recited, as they grew by reason of the divided use; and although the like mischief may grow upon the contingent uses, yet the statute had no foresight of them at that time, and so it was merely a new case not comprised.

Whereunto I answer, that I grant the work of the statute is to execute the divided use; and, therefore, to make any use void by this statute which was good before, though it do participate of the mischief recited in the statute, were to make a law upon a preamble without a purview, which were grossly absurd: but upon the question, what uses are executed, and what not, and whether out of the possession of a disseisor or other possessions out of privity, or not; there you shall guide your exposition according to the preamble; as shall be handled in my next day's discourse.

And so much touching the preamble of this law.

The body of the law.

For the body of the law, I would wish all readers that expound statutes to do as scholars are willed to do; that is, first, to seek out the principal verb; that is, to note and single out the material words whereupon the statute is framed: for there are, in every statute, certain words, which are veins where the

[1] "Boys" and "Boyse" appear as readers in Dugdale, and I presume are identical.
[2] I take Coke to be principally meant.

life and blood of the statute is and runneth, and where all doubts do arise and issue forth; and all the rest of the words are but *literæ mortuæ*, fulfilling words.

The body of the statute consisteth upon two parts: first, a supposition, or case put, as Anderson, 36 Reginæ called it; secondly, a purview, or ordinance thereupon.

The cases of the statute are three, and every one hath his purview: the general case; the case of feoffees to the use of some of them; and the case of feoffees to the use or perceivance of rents or profits.

The general case is built upon eight material words: four on the part of the feoffees; three on the part of *cestui que use;* and one common to them both.

The first material word on the part of the feoffees is the word person. This excludes all abeyances; for there can be no confidence reposed but in a person certain. It excludes again all corporations; for they are enabled to an use certain; for note, on the part of the feoffee ever[1] the statute insists upon the word "person"; and on the part of *cestui que use*, it ever addeth "body politic."

Bro. feoffm. al use, pl. 40.

The second word material is the word "seised." This excludes chattels. The reason is, that the statute meant to remit the common law, and not to alter it. Chattels might ever pass by testament or by parol; therefore the use did not pervert them. It excludes rights; for it was against the rules of the common law to grant or transfer rights; and therefore the statute would not execute them. Thirdly, it excludes contingent uses[2], because the seisin can but be to a fee-simple of an use, and, when that is limited, the seisin of the feoffee is spent: for Littleton tells us, that there are but two seisins, one, *in dominico ut de feodo*, the other, *ut de feodo*. And the feoffee by the common law could execute but the fee-simple to uses present, and no post uses: and therefore the statute meant not to execute them.

The third material word is "hereafter." That bringeth in conveyances made after the statute; it brings in, again, conveyances made before and disturbed by disseisin and recontinued after; for it is not said "infeoffed to use hereafter," but "seised."

[1] This, which Mr. Rowe conjecturally substituted for "feoffor over," is the reading of Harl. MS. 6688.

[2] See Note D. at the end.

The fourth word is hereditament; which is to be understood of those things whereof an inheritance may be, and not of those things whereof an inheritance is *in esse:* for if I grant a rent charge *de novo* for life to an use, this is good enough; yet there is no inheritance in being of this rent. This word likewise excludes annuities, and uses themselves; so that an use cannot be to an use.

The first word on the part of *cestui que use* is the word, "use, confidence, or trust"; whereby it is plain that the statute meant not to make "use" *vocabulum artis*, but it meant to remedy the matter, and not words: and in all the clauses it still carrieth the words.

The second word is the word "person" again: which excludeth all abeyances. It excludeth also all dead uses, which are not to bodies lively and natural; as the building of a church, the making of a bridge: but here, as was noted before, it is ever coupled with body politic.

The third word is the word "other." The statute meant not to cross the common law. Now at this time uses were grown into such familiarity, as men could not think of a possession but in course of use; and so every man was said to be seised to his own use, as well as to the use of others: therefore, because the statute would not stir nor turmoil possessions settled at the common law, it putteth in precisely this word "other," meaning the divided use and not the conjoined use. And this causeth the clause of joint feoffees to follow in a branch by itself; for else that case had been doubtful upon this word "other."

The words that are common to both are words expressing the conveyance whereby the use ariseth [1]; of which words those that breed any question are "agreement," "will," "otherwise;" whereby some have inferred that uses might be raised by agreement parol, so there were a consideration, [not][2] of money or other matter valuable, (for it is expressed in the words before, bargains, sale, and contract,) but of blood, or kindred: the error of which collection appeareth in the word immediately following, viz. "will", whereby they might as well conclude that a man seised of land might raise an use by will,

Collard v. Collard, Cro. Eliz. 344.

[1] Here Harl. MS. 6688. ends.

[2] Mr. Rowe conjecturally adds this word, which seems necessary. I have found authority for it.

especially to any of his sons or kindred, where there is a real consideration, and by that reason mean, betwixt this statute and the statute of 32 H. VIII. of Wills, lands were devisable, especially to any man's kindred: which was clearly otherwise; and therefore those words were put in, not in regard of uses raised by those conveyances, but in regard of uses formerly transferred by those conveyances; for it is clear that an use *in esse* by simple agreement with consideration or without, or likewise by will, might be transferred; and then there was a person seised to an use by force of that agreement or will, viz. to the use of the assignee. And for the word "otherwise," it should by the generality of the word include a disseisin to an use; but the whole scope of the statute crosseth that, which was to execute such uses as were confidences and trusts; which could not be in case of disseisin; for if there were a commandment precedent, then the land was vested in *cestui que use* upon the entry; and if the disseisin were of the disseisor's own head, then no trust.

And thus much for the case or supposition of this statute: here followeth the ordinance and purview thereupon.

The purview hath two parts: the first *operatio statuti*, the effect that the statute worketh; and there is *modus operandi*, a fiction, or explanation how the statute doth work that effect. The effect is, that *cestui que use* shall be in possession of like estate as he hath in the use; the fiction *quomodo* is, that the statute will have the possession of *cestui que use*, as a new body, compounded of matter and form, and that the feoffees shall give matter and substance, and the use shall give form and quality.

The material words in the first part of the purview are four.

The first words are "remainder and reverter." The statute having spoken before of uses in fee-simple, in tail, for life, or years, or otherwise[1], addeth, "or in remainder or reverter:" whereby it is manifest, that the first words are to be understood of uses in possession. For there are two substantial and essential differences of estates: the one limiting the times (for all estates are but times) of their continuances; this maketh the difference of fee-simple, fee-tail, for life, or years; and the

[1] These words "or otherwise" stand, in the editions and MS., thus: "or otherwise in remainder or reverter." I have transposed them to the place they occupy in the statute.

other maketh difference of possession, as remainder: all other differences of estate are but accidents, as shall be said hereafter.[1] These two the statute meant to take hold of, and at the words, "remainder and reverter," it stops; it adds not words, "right, title, or possibility," nor it hath not general words, "or otherwise;" whereby it is most plain that the statute meant to execute no inferior uses to remainder or reverter; that is to say, no possibility or contingencies; but estates only, such as the feoffees might have executed by conveyance made. Note also, the very letter of the statute doth take notice of a difference between an use in remainder and an use in reverter; which though it cannot be properly[2] (because it doth not depend upon particular estates as remainders do, neither did then before the statute draw any tenures as reversions do,) yet the statute intends that there is a difference, when the particular use and the use limited upon the particular use are both new uses, in which case it is an use in remainder; and where the particular use is a new use, and the remnant of the use is the old use, in which case it is an use in reverter.

The next material word is "from henceforth;" which doth exclude all conceit of relation, that *cestui que use* shall [not][3] come in as from the time of the first feoffment to use; as Brudnell's conceit was in 14 H. VIII., that, if[4] the feoffee had granted a rent charge, and *cestui que use* had made a feoffment in fee by the statute of 1 R. III., the [latter] feoffee should have held it discharged, because the act of *cestui que use* shall put the feoffee in as if *cestui que use* had been seised from the time of the first use limited. And therefore the statute doth take away all such ambiguities, and expresseth that *cestui que use* shall be in possession from henceforth; that is, from the time of the parliament for uses then in being, and from the time of the execution for uses limited after the parliament.

Bro. Feoffm. al use, 10.

The third material words are "lawful seisin, state, and possession;" not a possession in law only, but a seisin in fact; not a title to enter into the land, but an actual estate.

[1] The passage is not extant.

[2] According to Bacon, then, it would seem, even after the statute, an use in remainder did not depend on the particular estate. See Notes A. and D.

[3] I think this word should be left out. The meaning is, that in cases of feoffments before the statute and any intermediate charges, feoffments, &c. made by the feoffees, the statute should *not* relate back to avoid them.

[4] I have without authority changed "is" into "if," and inserted "latter" a little below.

The fourth words are, "of and in such estates as they had in the use;" that is to say like estates, fee-simple, fee-tail, for life, for years, at will, in possession, and reversion; which are the substantial differences of estates, as was said before. But both these latter clauses are more fully perfected and expounded by the branch of the fiction of the statute, which follows.

This branch of fiction hath three material words or clauses. The first material clause is, that the estate, right, title, and possession, that was in such person, &c. shall be in *cestui que use:* for that the matter and substance of the estate of *cestui que use* is the estate of the feoffee, and more he cannot have. So as, if the use were limited to *cestui que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestui que use* can have no inheritance: so if, when the statute came, the heir of the feoffee had not entered after the death of his ancestor, but had only a possession in law, *cestui que use* in that case should not bring an assize before entry, because the heir of the feoffee could not. So that the matter whereupon the use must work is the feoffee's estate. But note here: whereas before, when the statute speaks of the uses, it spake only of uses in possession, remainder and reverter, and not in title or right; now, when the statute speaks what shall be taken from the feoffee, it speaks of title and right: so that the statute takes more from the feoffee than it executes presently in cases where there are uses in contingence, which are but titles.[1]

The second word is, "clearly," which seems properly and directly to meet with the conceit of *scintilla juris*, as well as the words in the preamble, of extirping and extinguishing such feoffments: so as their estate is clearly extinct.

The third material clause is, "after such quality, manner, form, and condition, as they had in the use:" so as now, as the feoffee's estate gives matter, so the use gives form; and as in the first clause the use was endowed with the possession in points of estate, so [there it is endowed with the possession][2] in all accidents and circumstances of estate.

Wherein first note, that it is gross and absurd to expound the form of the use any whit to destroy the substance of the

[1] See Note E. at the end.

[2] Some such sense is required as: "here the possession is endowed with the qualities of the use."

estate: as to make a doubt, because the use gave no dower or tenancy by the courtesy, that therefore the possession when it is transferred would do so likewise: no, but the statute meant such quality, manner, form, and condition, as [it] is not repugnant to the corporal presence and possession of the estate. Next for the word "condition," I do not hold it to be put in for uses upon condition, though it[1] be also comprised within the general words; but because I would have things stood upon learnedly, and according to the true sense, I hold it but for an explaining, or word of the effect as it is in the statute of 26 H. VIII. of Treasons; where it is said that the offenders shall be attainted of the overt fact by men of their condition:—in this place, that is to say of their degree and sort:—and so the word condition in this place is no more but in like quality, manner, form, and degree or sort; so as all these words amount but to *modo et forma*. Hence, therefore, all circumstances of estate are comprehended; as sole seisin or joint seisin; by intierties or by moieties; a circumstance of estate to have age as coming in by descent, or not age as purchaser; a circumstance of estate descendable to the heir of the part of the father or of the part of the mother; a circumstance of estate conditional or absolute, remitted or not remitted, with a condition of intermarriage or without: all these are accidents and circumstances of estate, in all which the possession shall ensue the nature and quality of the use.

And thus much of the first case, which is the general case.

The second case, of the joint feoffees, needs no exposition; for it pursueth the penning of the general case. Only this I will note, that, although it had been omitted, yet the law upon the first case would have been taken as that case provided; so that it is rather an explanation than an addition. For turn that[2] case the other way, that one were infeoffed to the use of himself and others, (as that case is, that divers were infeoffed to the use of one of them;) I hold the law to be, that in the former case they shall be seised jointly; and so in the latter case *cestui que use* shall be seised solely: for the word "other" it shall be qualified by the construction of cases, as shall appear when I come to my Division. But because this case of co-feoffees to the use

[1] *Quære*: "that" or "they"?

[2] *Quære*: "the"?

of one of them was a general case in the realm, therefore they foresaw it, expressed it precisely, and passed over the case *e converso*, which was but especial and rare. And they were loth to bring in this case[1], by inserting the word "only" into the first case, to have penned it "to the use only of other persons;" for they had experience what doubt the word "only" bred upon the statute of 1 R. III. After this second case, and before the third case of rents, comes in the two savings[2]: and the reason of it is worth the noting, why the savings are interlaced before the third case. The reason of it is, because the third case needeth no saving, and the first two cases did need savings. And [that][3] is the reason of that again: it is a general ground, that where an act of parliament is donor, if it be penned with an *ac si*, it needs[4] not a saving, for it is a special gift, and not a general gift which includes all rights. And therefore in 11 H. VII. where, upon the alienation of women, the statute entitles the heir or him in remainder to enter, you find never a saving[5], because the statute gives entry not *simpliciter*, but within an *ac si* as if no alienation had been made, or if the feme had been naturally dead. Strangers that had right might have entered; and therefore no saving needs. So in the statute of 32 H. VIII. of leases, the statute enacts that the leases shall be good and effectual in law, as if the lessor had been seised of a good and perfect estate in fee-simple; and therefore you find no saving in the statute; and so likewise of divers other statutes, where a statute doth make a gift or title good specially against certain persons, there needs no saving; except it be to exempt some of those persons, as in the statute of 1 R. III.

[Delamere's case, Plowd. 350.]

Now to apply this to the case of rents, which is penned with an *ac si*, namely, "as if a sufficient grant or other lawful conveyance had been made or executed by such as were seised;" why, if such a grant of a rent had been made, one that had an ancient right might have entered and have avoided the charge; and therefore no saving needeth: but the first and second

[1] This is obscurely expressed: but Mr. Rowe seems rightly to understand Bacon to mean, "they were loth to make *three cases* by inserting the word 'only' into the first section, which would have made it more symmetrical; but they used words sufficient, probably, to include all cases in one, and then added the second case *ex abundanti*."

[2] I have substituted this for "second saving." If the original had the Arabic numeral the difference is very slight.

[3] *Quære*: "here" or "this"?

[4] "Needs" for "is," following Mr. Rowe.

[5] I have, with Mr. Rowe, substituted "saving" for "stranger."

cases are not penned with an *ac si*, but absolute, that *cestui que use* shall be adjudged in estate and possession, which is a judgment of parliament stronger than any fine, to bind all rights: nay, it hath farther words, *viz.* in lawful estate and possession, which maketh it the stronger [than any] [1], in the first clause; for if the words only had stood upon the second clause, *viz.* that the estate of the feoffee should be in *cestui que use*, then perhaps the gift should have been special, and so the saving superfluous.

And this note is very material in regard of the great question, whether the feoffees may make any regress; which opinion, (I mean, that no regress is left unto them,) is principally to be argued out of the saving; as shall be now declared. For the savings are two in number: the first saveth all strangers' rights, with an exception of the feoffees'; the second is a saving out of the exception of the first saving, *viz.* of the feoffees' in case where they claim to their own proper use. It had been easy in the first saving out of the statute, "other than such persons as are seised, or hereafter should be seised to any use," to have added these words, "executed by this statute;" or in the second saving to have added unto the words, "claiming to their proper use," these words, "or to the use of any other, not [2] executed by this statute:" but the regress of the feoffee is shut out between the two savings; for it is the right of a person claiming to an use, and not unto his own proper use. But it is to be noted, that the first saving is not to be understood as the letter implieth, that feoffees to use shall be barred of their regress in case that it be of another feoffment than that whereupon the statute hath wrought, but upon the same feoffment; as, if the feoffee before the statute had been disseised, and the disseisor had made a feoffment in fee to I. D. his use, and then the statute came: this executeth the use of the second feoffment; but yet the first feoffees may make a regress, and yet they claim to an use, but not by that feoffment upon which the statute hath wrought.

Now followeth the third case of the statute, touching execution of rents; wherein the material words are four:

First, "whereas divers persons are seised:" which hath bred a doubt that it should only go to rents in use at the time

[1] These words seem to have slipt in from above.
[2] I have substituted "not" for "and."

of the statute; but it is explained in the clause following, *viz.* "as if a grant had been made to them by such as are or shall be seised."

The second word is "profit:" for in the putting of the case, the statute speaketh of a rent, but after in the purview is added these words, "or profit."

The third word is *ac si*, "that they shall have the rent as if a sufficient grant or other lawful conveyance had been made and executed unto them."

The fourth words are the words of liberty or remedies attending upon such rent, "that he shall distrain, &c. and have such suits, entries, and remedies,"—relying again with an *ac si*, —as if the grant had been made with such collateral penalties and advantages.

Now for the provisoes.

The provisoes.

The makers of this law did so abound with policy and discerning, as they did not only foresee such mischiefs as were incident to this new law immediately, but likewise such as were consequent in a remote degree; and, therefore, besides the express provisoes, they did add three new provisoes, which are in themselves substantive laws. For, foreseeing that by the execution of uses wills formerly made should be overthrown, they made an ordinance for wills: foreseeing likewise that by execution of uses women should be doubly advanced, they made an ordinance for dowers and jointures: foreseeing again that the execution of uses would make frank-tenement pass by contracts parol, they made an ordinance for enrolments of bargains and sales. The two former they inserted into this law, and the third they distinguished into a law apart, but without any preamble, as may appear, being but a proviso to this statute.

Besides all these provisional laws, and besides five provisoes, whereof three attend upon the law of jointure, and two [concern, respectively, recognisances to the King's use and persons][1] born in Wales, which are not material to the purpose in hand, there are six provisoes which are natural and true members and limbs of the statute, whereof four concern the part of *cestui que use*, and two concern the part of the feoffees.

The four which concern the part of *cestui que use* tend all to save him from prejudice by the execution of the estate.

[1] Something like what I have inserted in brackets must have slipt out.

The first saveth him from the extinguishment of any statute or recognisance. As, if a man had an extent of a hundred acres, and an use of the inheritance of one; now the statute, executing the possession to that one, would have extinguished his extent, being intire, in all the rest: or as, if the conuzor of a statute, having ten acres liable to the statute, had made a feoffment in fee to a stranger of two, and after had made a feoffment in fee to the use of the conuzee and his heirs. And upon this proviso there arise three questions: First, whether this proviso were not superfluous, in regard that *cestui que use* was comprehended in the general saving, though the feoffees be excluded? Secondly, whether this proviso doth save statutes or executions, with an apportionment, or intire? Thirdly, (because it is penned indefinitely in point of time,) whether it shall go to uses limited after the statute, as well as to those that were in being at the time of the statute: which doubt is rather enforced by this reason, because there was [need thereof] for uses [in being] at the time of the statute; for that the execution of the statute might [not] be waived: but both possession and use, since the statute, may be waived.[1]

The second proviso saveth *cestui que use* from the charge of *primer seisin, liveries, ouster les mains,* and such other duties to the King, with an express limitation of time: that he should be discharged for the time past, and charged for the time to come; making, namely, May 1536, to be *communis terminus.*

The third proviso doth the like for fines, reliefs, and heriots; discharging them for the time past, and speaking nothing of the time to come.

The fourth proviso giveth to *cestui que use* all collateral benefits of vouchers, aid-prayers, actions of waste, trespass, conditions broken, &c.[2], which the feoffees might have had; and this is expressly limited for estates executed before 1° May 1536. And this proviso giveth occasion to intend that none of these benefits would have been carried to *cestui que use* by the general words in the body of the law, *viz.* that the feoffee's estate, right, title, and possession, &c.

For the two provisoes on the part of the terretenant, they both

[1] I have conjecturally added (in brackets) words which will give the sense that seems wanted.

[2] I have substituted "&c." for "and."

concern the saving of strangers from prejudice, &c. The first saves actions depending against the feoffees, that they shall not abate. The second saves wardships, liveries, and *ouster les mains*, whereof title was vested in regard of the heir of the feoffee, and this in case of the King only.

FIRST DIVISION ON THE STATUTE.[1]

THOUGH I have opened the statute in order of words, yet I will make my division in order of matter, *viz.*: The raising of uses; the interruption of uses; the executing of uses.

Again, the raising of uses doth easily divide itself into three parts: The persons that are actors in the conveyance to use; the use itself; the form of the conveyance.

Then is it first to be seen what persons may be seised to an use, and what not; and what person may be *cestui que use*, and what not; and what persons may declare an use, and what not.

What persons may be seised to an use.

The King cannot be seised to an use; no, not where he taketh in his natural body and to some purposes as a common person; and therefore, if land be given to the King and I. S. *pour terme de leur vies*, to the use of I. D., this use is void for a moiety.

Like law is it, if the King be seised of land in the right of his Duchy of Lancaster, and covenant by his letters patent under the Duchy seal to stand seised to the use of his son; nothing passeth.

Like law, if King R. III. who was feoffee to divers uses before he took upon him the crown, had after he was King by his letters patent granted the land over; the uses had not been revived.

The Queen, (speaking not of an imperial Queen, but of a Queen by marriage,) cannot be seised to an use. Though she be a body enabled to grant and purchase without the King; yet, in regard of the government and interest the King hath in her possession, she cannot be seised to an use.

A corporation cannot be seised to an use, because their capacity is to an use certain; again, because they cannot execute

[1] Harl. MS. 829. f. 137. begins here and has the heading Lect. I. Mr. Spedding thinks the handwriting may well be that of a person who was also employed a good deal by Bacon when he was Attorney General.

an estate without doing wrong to their corporation or founder; but chiefly because of the letter of this statute, which, in every clause when it speaketh of the feoffee, resteth only upon the word "person;" but when it speaketh of *cestui que use*, it addeth "person or body politic."

Notwithstanding [1], if a bishop bargain and sell lands whereof he is seised in the right of his see, this is good during his life: otherwise it is where a bishop in infeoffed to him and his successors, to the use of I. D. and his heirs: that is not good, no not for the bishop's life, but the use is merely void.

Bro. feoffm. al use, pl. 40.

Contrary law of tenant in tail: for if I give land in tail by deed since the statute to A. to the use of B. and his heirs, B. hath a fee-simple, determinable upon the death of A. without issue. [2] And like law, though more doubtful, before the statute: for the chief reason which bred the doubt before the statute was because tenant in tail could not execute an estate without wrong; but that, since the statute, is quite taken away, because the statute saveth no right of intail, as the statute of 1 R. III. did. And that reason likewise might have been answered before the statute, in regard of the common recovery.

A feme covert and an infant, though under years of discretion, may be seised to an use; for as well as land might descend now to them from a feoffee to use, so may they originally be infeoffed to an use. Yet if it be before the statute, and they had, upon a *subpœna* brought, executed their estate during the coverture or infancy, they might have defeated the same; but then they should have been seised again to the old use, and not to their own use: but since the statute no right is saved unto them.

If a feme covert or an infant be infeoffed to an use present since the statute, the infant or baron come too late to disagree or root up the feoffment; but if an infant be infeoffed to the use of himself and his heirs, and if I. D. pay such a sum of money, to the use of I. G. and his heirs, the infant may disagree, and overthrow the contingent use.

[1] This word is added from Harl. MS. 829.

[2] Mr. Rowe points out that this was the opinion of Manwood and others in two cases since the statute, 1 Dyer, 312 *a*, and 2 Leo. 16.: but that in *Lord Cromwell's case*, 2 Rep. 78., as well as in *Cooper v. Franklin*, Cro. Jac. 401., usually cited, the law was settled the other way. Lord Cromwell's case was at this time under discussion, and Bacon argued it for the defendant: but I do not see that his client was obviously interested in the ruling of this point one way or the other.

Contrary law, if an infant be infeoffed to the use of himself for life, the remainder to the use of I. S. and his heirs: he may disagree to the feoffment as to his own estate, but not to divest the remainder, but it shall remain to the benefit of him in remainder.

And yet, if an attainted person be infeoffed to an use, the King's title, after office found, shall prevent the use, and relate above it: but until office the *cestui que use* is seised of the land.

Like law of an alien: for if land be given to an alien to an use, the use is not void *ab initio*: yet neither alien nor attainted person can maintain an action to defend the land, which is one part of the confidence.

The King's villain if he be infeoffed to an use, the King's title shall relate above the use: otherwise in case of a common person.

But if the lord be infeoffed to the use of his villain, the use never riseth, but the lord is in by the common law and not by the statute, discharged of the use.

But if the husband be infeoffed to the use of his wife for years, if he die the wife shall have the term, and it shall not inure by way of discharge; although the husband may dispose of the wife's term.

So, if the lord of whom the land is held be infeoffed to the use of a person attainted, the lord shall not hold by way of discharge of the use, because of the King's title, *annum, diem, et vastum.*

A person uncertain is not within the statute; nor any estate *in nubibus* or suspense executed. As, if I give land to I. S. the remainder to the right heirs of I. D. to the use of I. N. and his heirs, I. N. is not seised of the fee-simple but only of an estate *pour vie* of I. S. till I. D. be dead, and then in fee-simple.

Like law if, before the statute, I give land to I. S. *pour autre vie* to an use, and I. S. dieth living *cestui que vie*, whereby the freehold is in suspense: the statute cometh, and no occupant entereth: the use is not executed out of the freehold in suspense.

For the occupant, the disseisor, the lord by escheat, the feoffee upon consideration not having notice, and all other persons which shall be seised to use not in regard of their persons but

of their title; I refer them to my division touching disturbance and interruption of uses.

It followeth now to see what person may be a *cestui que use.*

What person may be a *cestui que use.*

The King may be *cestui que use;* but it behoveth both the declaration of the use and the conveyance itself to be matter of record, because the King's title is compounded of both. I say not appearing of record, but by conveyance of record. And therefore if I covenant with I. S. to levy a fine to him to the King's use, which I do accordingly, and this deed of covenant be not inrolled, and the deed also be found by office; the use vesteth not. *E converso:* If I covenant with I. S. to infeoff him to the King's use, and the deed be inrolled, and the feoffment also be found by office, the use vesteth not.[1] But if I levy a fine, or suffer a recovery to the King's use, and declare the use by deed of covenant inrolled; though the King be not party, yet it is good enough.

A corporation may take an use, and it is not material whether either the feoffment or the declaration be by deed; but I may infeoff I. S. to the use of a corporation and this use may be averred.

An use to a person uncertain is not void in the first limitation, but executeth not till the person be *in esse;* so that this is positive, that an use shall never be in abeyance, as a remainder may be, but ever in a person certain, upon the words of the statute, "and the estate of the feoffees shall be in him or them which have the use." And the reason is, because no confidence can be reposed in a person unknown and uncertain.[2]

And therefore, if I make a feoffment to the use of I. S. for life, and then to the use of the right heirs of I. D., the remainder is not in abeyance, but the reversion is in the feoffor *quousque.* So that upon the matter all persons uncertain in use are like conditions or limitations precedent.[3]

Like law, if I infeoff one to the use of I. S. for years, the remainder to the right heirs of I. D., this is not executed in abeyance, and therefore not void.

[1] This word is supplied by Harl. MS. 829.

[2] The reason seems irrelevant; but I have no hint for improving it. It seems rather to belong to the ante-penultimate paragraph of p. 437.

[3] I am not sure that I understand these last two words; and the whole sentence is rather strange. All I suppose to be meant is that such uses come into *esse* by devesting a vested estate, as does a condition. Perhaps "or" should be read "on"

Like law, if I make a feoffment to the use of my wife that shall be, or to such persons as I shall nominate; though I limit no particular estate at all, yet the use is good, and shall in the interim return to the feoffor.

Contrary law, if I once limit the whole fee-simple of the use out of me, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use; but look how it should have gone unto the feoffor if I begin with a contingent use, so it shall go to the next [in] remainder if I interlace a contingent use; both estates alike subject to the contingent use when it falleth.

As when I make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son, (I having no son at that time,) the remainder to my brother and his heirs: if my wife die before I have any son, the use shall not be in me, but in my brother; and yet, if I marry again and have a son, it shall divest from my brother, and be in my son; which is the skipping they talk so much of.[1]

So if I limit an use jointly to two persons, not *in esse*, and the one cometh to be *in esse*, he shall take the entire use; and yet if the other afterward come *in esse*, he shall take jointly with the former. As, if I make a feoffment to the use of my wife that shall be and my first begotten son for their lives, and I marry, my wife taketh the whole use: and if I afterwards have a son, he taketh jointly with my wife.

But yet where words of abeyance work to an estate executed in course of possession, it shall do the like in uses. As, if I infeoff A. to the use of B. for life, the remainder to C. for life, the remainder to the right heirs of B.; this is a good remainder executed.

So if I infeoff A. to the use of his right heirs, A. is in of the fee-simple, not by the statute but by the common law.

Now are we to examine a special point of disability of persons to take by the statute: and that upon the words of the statute, "where divers persons are seised to the use of other persons;" so that by[2] the letter of the statute no use is contained but where the feoffor is one, and *cestui que use* is another.

[1] See observations on this passage in Note A. at the end.

[2] *Qu.*: in. Or perhaps the error is in the word "contained."

Therefore it is to be seen in what cases the same person shall be both seised to the use and *cestui que use*, and yet in by the statute; and in what cases they shall be diverse persons, and yet in by the common law. Wherein I observe unto you three things: First, that the letter is full in the point: secondly, that it is strongly urged by the clause of joint estates following: thirdly, that the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate. Therefore the statute ought to be expounded that, where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law.

As, if I give land to I. S. to the use of himself and his heirs, and if I. D. pay a sum of money, then to the use of I. D. and his heirs; I. S. is in by the common law, and not by the statute. Like law it is, if I give land to I. S. and his heirs, to the use of himself for life, or for years, and then to the use of I. D. or his heirs; I. S. is in of an estate for life, or for years, by way of abridgment of estate, in course of possession, and I. D. in of the fee-simple by the statute.

So if I bargain and sell my land after seven years; the inheritance of the use only passeth, and there remains in me an estate for years by a kind of subtraction of the inheritance or recouper[1] of my estate, but merely at the common law.

But if I infeoff I. S. to the use of himself in tail and then to the use of I. D. in fee, or covenant to stand seised to the use of myself in tail, and then to the use of my wife in fee; in both these cases the estate tail is executed by the statute: because an estate tail cannot be recouped out of a fee-simple, being a new estate and not like a particular estate for life or years, which are but portions of the absolute fee. And therefore if I bargain and sell my land to I. S. after my death without issue, it doth not leave an estate tail to me, nor vesteth any present fee in the bargainee, but is an use expectant.

So if I infeoff I. S. to the use of I. D. for life and then to the use of himself and his heirs, he is in of the fee-simple merely in course of possession at common law, and as of a reversion, and not of a remainder.

[1] So MSS. The Editions have "occupation," and below "re-occupy."

Contrary law, if I infeoff I. S. to the use of I. D. for life, then to the use of himself for life, the remainder to the use of I. N. in fee: now the law will not admit fraction of estates; but I. S. is in with the rest by the statute.

So if I infeoff I. S. to the use of himself and a stranger; they shall be both in by the statute, because they could not take jointly, taking by several titles.

Like law, if I infeoff a bishop and his heirs to the use of himself and his successors, he is in by the statute in right of his see.

And as I cannot raise a present use to one out of his own seisin; so if I limit a contingent or future use to one being at the time of limitation not seised, but after [he] becometh seised, at the time of the execution of the contingent use it is the same reason and the same law, and upon the same difference which I have put before.

As, if I covenant with my son that after his marriage I will stand seised of land to the use of himself and his heirs, and before marriage I infeoff him to the use of himself and his heirs, and then he marrieth; he is in by the common law, and not by the statute. Like law of a bargain and sale. But if I had let to him for life only, then he should have been in for life only by the common law, and of the fee-simple by the statute.

Now let me advise you of this, that it is not a matter of subtlety or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of use; but it is material for the deciding of many cases and questions; as for warranties, actions, conditions, waivers, suspensions, and divers other purposes.

For example; a man's farmer committeth waste; after, he in reversion covenanteth to stand seised to the use of his wife for life, and after to the use of himself and his heirs; his wife dies: if he be in of his fee untouched, he shall punish the waste; if he be in by the statute, he shall not punish it.

So, if I be infeoffed with warranty, and I covenant with my son to stand seised to the use of myself for life, and after to him and his heirs; if I be in by the statute, it is clear my warranty is gone; if by the common law, it is doubtful.

So if I have an eigne right, and be infeoffed to the use of I. S. for life, then to the use of myself for life, then to the use of I. D. in fee. I. S. dieth. If I be in by the common law, I cannot waive my estate, having agreed to the feoffment; but if

I be in by the statute, yet I am not remitted, because I am come in by my own act; but I may waive my use, and bring an action presently: for my right is saved unto me by one of the savings in the statute.

Now on the other side it is to be seen, where there is a seisin to the use of another person, and yet it is out of the statute: which is in special cases upon this ground; wheresoever *cestui que use* had remedy for the possession by course of common law, there the statute never worketh. And therefore, if a disseisin were committed to an use, it is in him by the common law upon agreement. So if one enter as occupant to the use of another, it is in him till disagreement.

So if a feme infeoff a man *causâ matrimonii prælocuti*, she hath remedy for the land again by course of law.

And therefore in those special cases the statute worketh not. And yet the words of the statute are general, "where any person stands seised by force of any fine, recovery, feoffment, bargain and sale, agreement or otherwise": but yet the sense is to be restrained for the reason aforesaid.

What persons may limit and declare an use.

It remaineth to show what persons may limit and declare an use. Wherein we must distinguish: for there are two kinds of declarations of uses; the one of a present use upon the first conveyance, the other upon a power of revocation or new declaration; the latter of which I refer to the division of revocation: now for the former.

The King upon his letters patent may declare an use; though the patent itself implieth an use, if none be declared.

If the King give lands by his letters patent to I. S. and his heirs to the use of I. S. for life, the King hath the inheritance of the use by implication of the patent; and no office needeth, for implication out of matter of record amounteth ever to matter of record.

If the Queen gave land to I. S. and his heirs to the use of the churchwardens of the church of Dale, the patentee is seised to his own use upon that confidence or intent; but if a common person had given land in that manner, the use had been void by the statute of 23 H. VIII. c. 10. and the use had returned to the feoffor and his heir.

A corporation may take an use without deed, as hath been said before; but can limit no use without deed.

An infant may limit an use upon a feoffment, fine, or recovery; and he cannot countermand or avoid the use, except he avoid the conveyance.

Contrary law if an infant covenant in consideration of blood or marriage to stand seised to an use, the use is merely void.

If an infant bargain and sell his land [1] for commons or teaching, it is good with an averment. If for money, otherwise; if it be paid [2] it is voidable; if for money recited and not paid, it is void: and yet in the case of a man of full age the recital sufficeth.

If baron and feme be seised in right of the feme, or by joint purchase during the coverture, and they join in a fine; the baron cannot declare the use for longer time than the coverture, and the feme cannot declare alone, but the use goeth according to the limitation of law unto the feme and her heirs: but they may both join in declaration of the use in fee; and if they sever, then it is good for so much of the inheritance as they concur in; for that the law accounteth all one, as if they joined. Beckwith's case, 2 Co. 56.

As, if the baron declare an use to I. S. and his heirs, and the feme another to I. D. for life, and then to I. S. and his heirs, the use is good to I. S. in fee.

And if upon examination the feme will declare the use to the judge, and her husband agree not to it, it is void, and the baron's use is only good; the rest of the use goeth according to the limitation of law.

[3]But if the husband discontinue the wife's land; although the feme join with him by deed, yet the husband's declaration is good of the inheritance.

When divers in remainder join with the tenant of the freehold in a lawful conveyance wherein all remainders do concur, and they sever in declaration of the use, every man's declaration shall be good for his own estate. But if they do not all concur that have estate, but that the conveyance is tortious in any part, then the declaration of the tenant of the freehold is only good. As, if tenant for life be, the remainder in tail, the remainder in fee; and they join in a fine and declare uses severally; tenant for life to I. S., tenant in tail to I. D., and

[1] I have omitted the words "for money," which are in all editions and MSS. I have seen.

[2] So Harl. MS. 829. for the common reading "proved."

[3] From here to the end is taken from Harl. MS. 829. f. 140 b. It appears never to have been printed.

tenant in fee to I. N.: I. S. hath *pour vie* of the tenant for life, I. D. hath to his heirs as long as tenant in tail hath heirs of his body, and I. N. hath the absolute fee.

Contrary law, if tenant for life or in tail and he in the remainder in tail join in a fine without him in the remainder in fee, and tenant in possession declareth to I. S. and tenant in remainder to I. D.: I. S.[1] hath the whole fee simple; and it shall not enure by way of declaration of use of several moieties, as if they had been jointly seised.

So, if tenant in possession and he in the remainder in fee join in a fine, where there is a mean remainder in tail who joineth not, and they sever in declaration; the tenant in possession's declaration is good only.

So, if tenant in tail suffer a common recovery, wherein he in the reversion is vouched and joins; yet the declaration of tenant in tail is only good.

But if tenant for life, the remainder in tail, be; and tenant for life suffer a common recovery, wherein he in remainder is prayed in aid or vouched; there the declaration is good, of tenant for life only for his life, and of tenant in tail for the rest: but if it had not been an immediate remainder in tail, then the tenant for life's declaration had been good for the whole fee-simple.

If two tenants join in conveyance and sever in declaration, it is good severally for their moieties.

But if disseisor and disseisee join in a fine and sever in the declaration of the use, the declaration of the disseisor is only good.

If the feoffee to use and *cestui que use* before the statute join in feoffment to one that hath notice, and sever in the declaration of the use; the declaration of *cestui que use* is only good.

The feoffor or grantor that hath the use is the only person that may declare the use, and the declaration of the feoffee is utterly void. As, if I make a feoffment in fee, and the feoffee by his deed declare it to be to the use of I. S.; it is void.

But you must intend this rule of those that are feoffor and feoffee upon the original conveyance, and not upon a perfective conveyance which was induced. As if I covenant that I will infeoff I. S. upon condition to re-infeoff me, or covenant that I

[1] The MS. omits I. S. here; obviously by a clerical error.

will levy a fine with a *render* to myself, and this re-feoffment or this *render* shall be to the use of I. D.: now, upon the matter, I declare an use upon a conveyance wherein I was grantee or feoffee; but yet it is good. So, if I covenant with divers persons, and the words are "It is covenanted and granted between the parties:" yet if the rest declare new uses before the execution of the estate, it is nothing: but if I declare new uses without their assent to it, it is a good countermand: as shall be more fully shewed in my division of countermands and revocations of uses.

NOTES.

NOTE A. (Page 395.)

BACON has nowhere told us what he considered to be the true result of Chudleigh's case; and I confess I have not been able fully to satisfy myself as to his opinion.

The majority of the judges, and Coke, the reporter, certainly maintained the doctrine of the *scintilla juris*; viz. that in all cases where there were limitations of uses not at the time vested, the ultimate execution of them depended on a certain right or vestige of estate remaining in the original feoffees, and was therefore liable to be suspended by any event which put this right in abeyance, and destroyed by anything which absolutely barred their re-entry. This doctrine, it may be observed, would apply equally to shifting and springing uses as to those in the nature of contingent remainders; the question in all cases would be, when the time or contingency arrived, whether the feoffees had then a right to enter, or were barred by their own act or otherwise.

This doctrine Bacon urged in his Argument, but I think there are indications that he doubted its soundness[1]; at all events, he emphatically repudiates it in this Reading as a "conceit."

Neither does he in the least incline to the opinion of some of the judges (which was also Coke's, pp. 129b. and 132a.), that the decision tended to invalidate all limitations which are contrary to the rules of the common law: for the whole drift of this treatise is to maintain uses, not as "imitations of possession," but as guided by the intention of the settlor; and moreover he puts many cases of shifting uses in his Division.

But neither is there any indication of his holding the doctrine that has ultimately prevailed, and founds itself, as to one branch, on Chudleigh's case; viz. that where the use limited is one that might take effect as a remainder at common law, it shall have the incidents of a common law remainder, and is liable to fail on the determination of the preceding estate; but that when it is in its

[1] See his observations on the law before the statute, as remarked on below.

creation independent of particular estates and therefore does not resemble a common law remainder, it shall, if not void at the first as a perpetuity, be indefeasible. There is no indication whatever of his having distinguished between these two classes of limitations, and there is one case at least (p. 439.) which absolutely negatives such a supposition. He there states that on a feoffment to the use of the feoffor's wife for life, remainder to his unborn child, remainder to B. in fee, although the wife die before the birth of this child and B. comes into possession; yet on the subsequent birth of a child by another wife the estate shall devest from B. and come to the child.

I think a comparison of this supposed case with Chudleigh's, viewed in connexion with some passages of Bacon's Argument, may help us to his real opinion.

In the supposed case the first estate determined naturally, and B. was in under the limitations of the settlement: in Chudleigh's case the trustees' estate was forfeited, and the plaintiff was in by wrong and without privity with the settlement. Now Bacon argued that "the statute succeeds in office to the feoffees," and unquestionably this remained his deliberate opinion in opposition to the theory of the *scintilla*. But he also argued that "the statute did not alter the law as to the raising of uses, but only to draw the possession after them," and that therefore as "a contingent use could not rise at common law if the possession of the feoffees was estranged, no more can it now." Now, putting these two passages together, the "estrangement of the possession of the feoffees" before the statute seems to answer to the estrangement of privity of estate at the time when the statute should (as expressed in other passages in the Argument, though with the intermixture of language adapted to the doctrine of the *scintilla* he was there supporting) receive the estate from the existing *cestui que use*, and deliver it over to the person entitled on the contingency. In short, I incline to think Bacon held that all uses not vested in possession or remainder at their creation stood on the same footing, and were not affected by any act or omission of the feoffees to uses (whose functions were gone as soon as created), but were all liable to be barred by any acts of those who had the vested estates which operated to destroy or suspend those estates.

In his argument in Stanhope's case "of Revocation of Uses," of which the date is presumptively during his Solicitor-Generalship, and certainly later than 2 *Jac.*, he cites Chudleigh's case (under the name Freine *v.* Dillon) as an authority for the position that "it is safe so to construe the statute of 27 Hen. VIII., as that uses may be made subject to the rules of the common law," which corresponds well enough with the use now-a-days made of the case; but this

was after Coke's report of this and Archer's case, and after many other decisions, and cannot help us much, I think, in settling Bacon's opinion in 42 Eliz.

Note B. (Page 402.)

Bacon's application of this principle to the decision of the "great and principal doubts" of his day is not extant. It seems to me clear that he must have expounded it to the maintenance, generally, of springing uses, &c., according to the intention of the settlor, which ought to guide "the private conscience of the feoffee;" and that the "general conscience of the realm" would be called in, partly to "consult with the rules of law, where the intention of parties did not specially appear," (which would exactly hit the final interpretation of Chudleigh's case); and partly perhaps to condemn and avoid attempts in fraud of the policy of the law, as was ultimately done in regard of perpetuities by setting a positive limit within which future uses not limited by way of remainder must rise. I suppose it to have been in aid of this latter function of chancery that he, just below, invokes the aid of parliament.

Note C. (Page 411.)

This observation has been thought inconsistent with that in p. 400, that "an use is no covin," the sense of the last-mentioned passage being obscured in the editions by the wrong reading which followed. In Bacon's time and in his view, the point was not, I think, without some practical bearing. It was a question whether uses were to be looked upon as abuses and frauds on the policy of the law, which were only to be tolerated because so inveterate, but to be jealously watched and restrained; or whether they were essentially founded in the necessities of society and therefore sanctioned by "the common law, which is common reason," and were only accidentally ministerial to frauds and covins. Bacon adopts this latter view, and would accordingly give the statute a liberal interpretation. His definition of an use is: a general trust of the land, as distinguished from a "confidence" or special and temporary trust. But he here infers from history that what led to the habit of putting land into use—*i. e.* of permanently separating the equitable from the legal ownership—was the special unlawful, and not the special lawful,

intent,—the covin, and not the confidence. And it is indeed obvious that an unlawful purpose could only be carried out by making the lawful ownership apparently general, with a secret understanding about the use to be made of it; whereas a legal purpose might have been always made apparent on the face of the deed of feoffment, and a re-entry provided for on the full performance or the neglect of it.

Note D. (Page 424.)

I UNDERSTAND neither the doctrine Bacon here intends to lay down, nor the arguments by which he supports it; and, so far as I have any apprehension of what may be meant, it seems to be out of place here. As the passage bears upon the interpretation of his views on the controversies of the day, I will state my difficulties at some length.

As to the doctrine itself there can be no doubt at all that Bacon did not mean that contingent uses in general are void in their creation since the statute, nor to deny that the statute meddles with them in some sense. Even those who held that, until the time for vesting, a *scintilla juris* remained in the feoffees on which the statute worked when it became an estate or right of entry, can hardly have denied that this *scintilla* was the creation of the statute; but Bacon strenuously denies that doctrine, and therefore either he must hold that the statute does its work at the first creation while the use is still contingent (converting it from a contingent use or equity to a contingent estate or title cognisable in the courts of common law); or, if it remain a mere equity until the time for vesting, still the statute must, in his view, have shifted the fiduciary liability, either putting it *in gremio legis* (as some of the judges have it) or (as I rather believe Bacon would say) making the successive owners of vested estates, while in privity, trustees to preserve the contingent use.

But if any such doctrine as this is meant, it should come further on, where indeed it is repeated (pp. 474. 438.) with an intelligible argument from other words of the statute in its support. Here Bacon is professedly dealing not with the description of uses, but with the nature of the possession on which the statute works, as limited by the word "seised."[1] As one cannot be seised of a chattel, so chattels are not within the statute; *ex. gra.*, if I grant a lease to A. to the use of B., this remains a trust for B. and is not executed as a legal

[1] There is a corresponding passage in the *Argument* in *Chudleigh's* case; but it is there more rationally put,—from the words "seised to the use &c.,"—that one cannot be seised to a non-existent use.

estate in him. Again, one cannot be seised of a bare right, and therefore these are excluded: *ex. gra.*, if a disseisee bargained and sold the land to a stranger while out of possession, the legal right of entry would not pass from him to the stranger. So far all is clear and consistent. But if a third inference was to be drawn at all sounding like what we have here, it appears to me that it should have been that one cannot hold a contingency to an use, just as he has already laid down that an abeyance cannot be to an use: *ex. gra.*, as he tells us in his *Division*, that on a feoffment to A. for life with remainder to the right heirs of B., to the use of C. (which is an abeyance), C. will only presently take an estate for the life of A., so would he lay down the same law if the feoffment had been to A. for life with remainder to B. if he shall return from Rome (which would be a contingency). And this might be a fair inference from the fact that B. would not be "seised" *in dominico* or *ut de feodo*, and so fulfil the words of the statute, until he returned. But I cannot understand the argument that *because* of this word "seised" a contingent *use* cannot be executed *out of* a seisin in fee-simple.

The reason which follows, why "the statute meant not to execute contingent uses" is one which he also alleges in the Argument. Before Popham and others had given their judgment, one can conceive that Bacon was unaware or had forgotten that such a contingent use as the one in that case—a contingent remainder to an unborn child—might have been limited at common law by the feoffee; but the repetition of the opinion here after that judgment, of which Bacon certainly had a full report before him, is puzzling. The only attempt at explanation I can make (and that not satisfactory to my own mind) is that the contingent use seemed to Bacon essentially distinct from the contingent remainder, inasmuch as the former allowed the subsequent estates to vest and acted as a shifting use to devest them afterwards when the contingency arose, whereas the latter made all subsequent estates, like itself, to be in abeyance: the feoffee, therefore, before the statute could not create legal estates with incidents similar to those of the contingent uses until the contingency arose. See in the Division, p. 438.

Note E. (Page 428.)

Here again I think there is a confusion between the estate of the feoffee and the right to the use. If any inference at all is to be drawn from the occurrence of the words "title" and "right" here, it would seem to be that (contrary to Bacon's former position) a right as well as an actual possession may be held to an use.

USE OF THE LAW.

PREFACE.

I HAVE already expressed my belief that this treatise is not Bacon's.

In point of external evidence the case stands thus:

1. The only two MSS. I am aware of, Harl. MS. 1201. and Sloane MS. 4263., have no name of the author. They are different texts, though more resembling each other than either does the first printed one.

2. The *imprimatur* for the first edition—at least it bears date the year of the first edition,—is given by Archbishop Sancroft, cited in Blackburn's edition of Bacon, as follows:

"June 3rd, 1629. Sam. Maunsell, utter barrister of the Middle Temple, having perused this book, attested it to be very useful to all young students of the law and worthy to be imprinted:" and then, "Lambethæ Junii 4° 1629, *ut in aliená arte alieno nixus judicio, libelli hujus imprimendi potestatem facio.*

"Johannes Jefferay."

This does not seem to me to be the way in which a work known or supposed to come from such an author would be spoken of or licensed; and, accordingly,

3. The first shape in which it appeared in that same year was anonymous, and (as appears by the preface) without any suspicion of the authorship, by way of companion to a fragment of Sir John Doderidge's *English Lawyer.* This latter is there entitled "*The Lawyers' Light:* or a due direction for the study of the law, &c., by the reverend and learned professor thereof, J. D.;" and the *Use of the Law* is "annexed for affinity of the subject." The Preface is also anonymous, and

begins thus: "I present unto you two children, the one whereof hath an author unknown, the other a father deceased." Now Doderidge was already dead, and must have been easily recognisable as "J. D." He would seem therefore to be the author referred to in the second branch of the sentence; and hence I conclude again that the author of the other Tract was unknown.

4. Both these treatises were next published by other parties, the "Assignees of John Moore, Esqre.," separately, and in consecutive years; Doderidge's treatise,—now complete and with its new title,—in 1631, with a preface stating it "was heretofore obscurely printed by an imperfect copy from a then unknown author," and was now printed "in fair light by the author's own copy written (for the most part) with his own hand:"—all of which I extract to show that these publishers knew the value of an authentic pedigree when they could furnish it.

The other treatise, *The Use of the Law*, they published in 1630, annexed to the *Maxims*, then first published, but with no preface at all. There is a general title-page and also a particular one to each treatise; and that to *The Use of the Law* has "by the Lord Verulam, Viscount of St. Albans." Now this cannot have been the title actually on a MS. coming, or textually copied, from Bacon's own Collections, unless we suppose it to have been written within the last few years of Bacon's life.[1] I do not think any one will believe, on the internal evidence, that it can be the product of his maturer years; and I therefore conclude that it was not from any MS. evidence, but on some other now unknown ground, that the Assignees of John Moore gave the authorship to Bacon.

5. It must however be said that the authorship so asserted seems to have been accepted without hesitation from that time forward, unless Archbishop Sancroft's note may be taken to imply a doubt. It is in Rawley's list at the end of the *Resuscitatio*, and the printed book was, with other of Bacon's then published works, given to (and now remains in) Gray's Inn Library, by Bacon's relations Nathaniel and Francis, in 1635.

[1] Generally, I think, late copies of Bacon's authentic works continue the "Mr. F. Bacon," or "Sir F. Bacon," of the originals they are taken from.

The work is not mentioned in the *Commentarius Solutus;* but neither is the *Reading on Uses:* and the negative argument must not therefore be too much pressed. Still the inference seems to be that, if the work be genuine, it was either out of Bacon's hands or uncommenced in 1608.

This is, so far as I know, the whole external evidence on either side. It may be fairly summed up, I think, by saying that no MS. seems ever to have been seen wherein the work was other than anonymous; but that the second publishers, without alleging any reason, gave it out as Bacon's within four years after his death; and that this ascription has been acquiesced in.

The internal evidence is, to me, nearly decisive against it; but this must be in a great measure matter for each man's personal impression, and I can only briefly state my own.

1. As to style: I do not think it would have been possible for Bacon to have written so many consecutive pages on any subject, however dry and technical, without some turns of expression, some illustrations, some hints of a range of thought beyond his immediate subject, which would at once be felt to be characteristic of the man; and I cannot perceive any one passage of the kind. The treatise is favourably distinguished from many others of that time by freedom from pedantic affectations of classical or scriptural learning and philosophy; but if it is free from the spurious pretence, it is equally so from the thing itself.

2. The matter of the treatise may, as Mr. Maunsell says, have been very useful for young students, but the method seems to be peculiarly unlike Bacon's, and indeed childish. In any known treatise of Bacon's, whatever else may be unfinished, the preface and introduction, the laying out of the plan and conception of the work, are perfect: it is obviously the first step he took, and he often went no farther; and if such preface was lost or was in fact never written, the body of the treatise might be aphoristic, but never ill planned. Here, in a work on the use of the law, *i. e.* its application to private rights, we have nothing proposed for discussion but wrongs of violence to the person, the ways in which men may dispose of (and, we must infer, acquire) property, and (perhaps) the law relating to slander: no such heading (to enlarge no farther) as that of

wrongs to property. Then we have an enumeration of some half dozen crimes and their punishment; and then a fresh passage to the constitution of courts of justice, and the power of constables and officers of the peace. Then we pass to the head of property in land; under which we have in the first rank, *special occupancy;* next (without any previous division of estates) the law of *descent.* Next, the whole doctrine of tenures is introduced as an accessory,—the law of *escheat,* viewed as a mode of acquiring land, being the principal subject; and then, under the title of *conveyance,* we get some general notions of the divisions of estates according to our law, beginning with leases for years, and passing on through estates tail to fee-simple; and, finally,—without any attempt at defining the difference between real and personal property, except *obiter* and at the very end of the treatise, in an enumeration of the things with which an executor may meddle,—we have the ways in which property in goods may be acquired. Surely Bacon could never,—at least after his school-boy days,—have composed a treatise on such a plan.

3. The historical or antiquarian views which occur are distinctly opposed to Bacon's authentic opinions. This treatise attributes all our laws and constitution to the Conqueror; and herein especially, 1st, the institution of constables, and 2ndly, of Shires, County Courts, Courts Leet, &c., all of which are alleged to have been erected subsequently to, and in ease of, the King's Bench; which latter court, moreover, is supposed itself to have first come into existence when the Conqueror grew tired of doing justice in his own person. Now not to dwell on the absurdity of all this, Bacon, when Attorney General, and again after his fall in his propositions for a Digest of the Laws, asserts that "they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs;" and in the *Answers to the questions proposed by Sir Alexander Hay,* he makes the institution of constables and division of the territory into Shires, &c., of Saxon or earlier origin.

While rejecting this treatise as Bacon's on these grounds, I may offer the suggestion that one of his commonplace books may have furnished some of the materials for it, and that this may account for the whole being put upon him.

The text here given is mainly from the two MSS. above

mentioned; and where they differ I have generally preferred the Harl. MS. which seems to me the more genuine: the Sloane MS. is obviously corrected in its antiquarian paragraph, and I think not by the author. But I have noted some of the more important variations of the text, so that the reader may judge for himself.

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THE USE OF THE LAW.

THE use of the law consisteth principally in these two things: the one, to secure men's persons from death and violence: the other, to dispose the property of their goods and lands.[1]

For safety of persons, the law provideth that any man standing in fear of another may take his oath before a justice of peace, that he standeth in fear of his life; and the justice shall compel the other to be bound with sureties to keep the peace.

If any man beat, wound, or maim another, [or give out false words that may touch his name,] the law giveth [an[2] action of the case, for the slander of his name; and] an action of battery, and an appeal of maim, by which recompense shall be recovered to the value of the hurt and damage.

If any man kill another with malice, the law giveth an appeal to the wife of the dead, if he had any, or to the next of kin that is heir in default of a wife; by which appeal the offender convicted is to suffer death and to lose all his lands and goods. If the wife or heir will not sue, or be compounded withal, yet the King is to punish the offence by indictment or presentment of a lawful inquest, and trial of the offender before competent judges: whereupon being found guilty, he is to suffer death and lose his lands and goods.

If one man kill another upon a sudden quarrel, this is manslaughter; for which the offender must die, except he can read; and if he can read, yet must he lose his goods and be burnt in the hand, but lose no lands.

If a man kill another in his own defence, he shall not lose his life nor his lands; but he doth lose his goods, except the party slain did first assault him, to kill or trouble him by the highway side, or in his own house; and then he shall lose nothing.

[1] The printed edition has "three things," the "third" being "for preservation of their good names from shame and infamy."

[2] The parts in brackets are omitted in Sloane MS.; and the form of the sentence, in which the damages seem grammatically attributable only to the action of battery, &c., inclines me to think that these are additions.

If a man kill himself, all his goods and leases are forfeited, but not his lands.

If a man kill another by misfortune, as shooting an arrow at a butt or mark, or casting a stone over a house, or the like, he is to lose all his goods and leases, but not life or lands.

If a horse, or beast, or cart, or any other thing do kill a man, the horse, beast, cart, or other thing whose motion is used to the death, is forfeited to the crown, and is called a deodand and and usually granted and allowed by the King to some Bishop his Almoner, as goods are of those that kill themselves.

The cutting out of a man's tongue or putting out his eyes maliciously is felony; for which the offender is to suffer death and lose his lands and goods.

But for that all punishment is for example's sake, it is good to see the means whereby offenders are drawn to their punishment.

And first for matter of the peace:

The ancient laws of England planted here by the Conqueror (from whom, and not above, we derive our laws, he having subdued all the former laws)[1], were, that there should be officers of two sorts in all the parts of this realm to preserve the peace: the one *constabularii pacis*, the other *conservatores pacis*. The constable's office was, to arrest the parties that he had seen breaking the peace or ready to break the peace, or was truly informed by others, or their confession, had freshly broken the peace: which persons he might imprison in the stocks or in his own house, as their quality required, until they had been bound with sureties by obligation to the King to keep the peace; which obligation was to be sealed and delivered to the constable to the use of the King; and that the constable was to send this obligation to the King's Exchequer or Chancery, from whence process should be awarded to levy the debt, if the peace were broken.

But the constable could not arrest any, nor make any put in bond upon complaint of threatening, except he had seen them break the peace, or had come freshly after the peace was broken.

[1] The printed text omits the parenthetic sentence.

Also, these constables did keep watch about the town for the apprehension of rogues and vagabonds, night-walkers, eves-droppers, scolds, and such like, and such as did go armed. And the constables raise and follow hue and cry against murderers, manslayers, thieves, and robbers.

Of this office of constable there were high constables and petty constables; high constables, two of every hundred; petty constables, one in every village. They were in ancient time all appointed by the sheriff of the shire yearly, in the court called the Sheriff's Turn, and there they received their oath. But at this day they are appointed and sworn either in the Law-day of that precinct wherein they serve, or else the high constables in the sessions of the peace.

The Sheriff's Turn is a court very ancient, incident to his office, and began upon this occasion.

At the first[1] the Conqueror taking upon him to do justice in his own person, found that he could not attend to it, and hereupon erected his Court called the King's Bench, appointing men studied in the knowledge of his laws to execute justice as substitutes to him in his name; which men are to be named *Justiciarii ad placita coram Rege tenenda assignati:* one of them being *Capitalis Justiciarius* called to his place by the King's writ; the rest in number as pleaseth the king, (of late but three *Justiciarii,*) holding by patent.

In this court every man above twelve years old was to take his oath of allegiance to the King were he Norman or Saxon: also, if he were a freeman and not bond[2], he was to put in pledges for his allegiance to the King: if he were bond, then his lord was to answer for him. In this court constables were appointed and sworn; breakers of the peace punished by fine and imprisonment; the parties beaten or hurt recompensed upon complaints with damages; all appeals of murder, maim, or robbery, decided; contempts against the crown, public annoyances against the people, treasons and felonies, heard and determined; and all other matters of wrongs for lands or goods between party and party.[3]

[1] The printed text has: "it was erected by the Conqueror and called the King's Bench."

[2] "bound" in MSS.; but I take the meaning to be bondsman, and have adopted the modern spelling.

[3] The Sloane MS. in this place shows the hand of a corrector who was aware the Sheriff's Turn was not a substitute for the King's Bench, by making sundry clumsy additions to the text as it stands in Harl. MS.

But the King seeing the realm grow daily more populous and that this one court could not dispatch all, did first ordain that his marshal should keep a court for controversies arising within the verge, which is within twelve miles of the chief tunnel[1] of the court.

But this Court did but ease the King's Bench in matters only concerning debts, covenants, and such like, of those of the King's household only, never dealing in breaches of the peace or concerning the crown by any other persons, or any pleas of lands. Insomuch as the King, for farther ease, having divided this kingdom into counties, and committing the charge of every county to a count, *comes*, or earl, did direct that those earls, within their limits, should look to the matters of the peace, and take charge of the constables, and reform public annoyances, and swear the people to the crown, and take pledges of the freemen for their allegiance. For which purpose the count did once every year keep a court, at which all the people of the county except women, clergy, children under twelve, and aged above sixty, did appear to give or renew their pledges of allegiance. And that court was called *Visus franci plegii*, a View of the Pledges of Freemen, or, *Turna Comitatus*.

At which meeting or court there fell, by occasion of so great assemblies, much bloodshed, scarcity of victuals, mutinies, and the like mischiefs which are incident to the congregations of people; by which the King was moved to allow a subdivision of every county into hundreds, and every hundred to have a court, whereunto the people of that hundred should be assembled twice a year for survey of pledges, and use of that justice that was exercised in the former grand court for the county: and the count or earl appointed a bailiff under him to keep these hundred courts.

But in the end, the Kings of this realm found it necessary to have all execution of justice immediately from themselves, by such as should be more bound than earls were to that service and readily subject to correction for their negligence or abuse, and therefore took to themselves the appointing of sheriffs yearly in every county, calling them *vicecomites*, and to them directed such writs and precepts for executing justice in the county as fell out needful to have dispatched, committing to the sheriff *custodiam comitatus*; by which the earls were spared of their

[1] "tenell" is the word used in 2 stat. 13 Rich. II. c. 3., and the translation in Ruffhead's *Statutes* is "lodging."

toil and labour, and it was laid upon the sheriffs. So as now the sheriff doth all the King's business in the county; that is to say, he is judge of this grand court for the county, and it is now called the Sheriff's Turn; and also of all hundred courts not given away from the crown.

He hath another court, called the County court belonging to his office, wherein men may sue monthly for debts or damages under forty shillings, and may have writs to replevy their cattle distrained and impounded by others, and there try the cause of the distress; and by a writ called *justicies*, a man may sue for any sum; and in this court the sheriff, by the King's writ called an *exigent*, doth proclaim men sued in courts above to render their bodies, or else they be outlawed.

The sheriff doth serve all the King's writs of process, be they summons or attachments, to compel men to appear to answer the law; and all writs of execution of the law according to judgments of superior courts, for taking of men's goods, lands, or bodies, as the case requireth.

[1] Of these hundred courts there is a jurisdiction known and certain; and that is, first, to deal in such things as the sheriff in his Turn might do. And they be in common speech called Law-days or Leets, to be kept twice a year. But the content, precinct, and limit of the court is uncertain, for that all hundreds be not equal nor guided by any certain rule of content, but long since allotted out and by use to this day well known in their bounds, some containing in them divers villages, some fewer.

The hundred courts were most of them granted to religious men, noblemen, and others of great place. And also many men of good quality have obtained by charter, and some by usage, within manors of their own, the liberty of keeping Law-days, and to use there the justice appertaining to a Law-day.

Whosoever is lord of the hundred courts is to appoint the two high constables of the hundred, and also is to appoint in every village a petty constable, with a tithing man to attend in his absence, and to be at his command when he is present, in all services of his office, for his assistance.

There have been by use and statute law, besides surveying pledges of freemen, and giving the oath of allegiance, and making constables, many additions of power and authority given to the stewards of Leets and Law-days to be put in ure in

[1] This is not in the printed text, and does not seem well fitted in.

their courts. As for example, they may punish innkeepers, victuallers, bakers, brewers, butchers, poulterers, fishmongers, and tradesmen of all sorts, selling at under weight or measure, or at excessive prices, or things unwholesome, or ill made, in deceit of the people. They may punish those that stop, straiten, or annoy the highways, or do not, according to the provision enacted, repair or amend them, or divert water courses, or destroy fry of fish, or use engines or nets to take deer, conies, pheasants, fowl, or partridges, or build pigeon houses (not being lord of the manor, nor parson of the church). They may also take presentment upon oath of the twelve sworn jury before them of all manner of felonies, but they cannot try the malefactors; only they must by indenture deliver over these presentments of felony to the judges, when they come their circuits into that county.

All these things before mentioned are in use and exercised as law at this day, concerning the sheriffs' Law-days and Leets, and the offices of high constables, petty constables, and tithing men; howbeit, with some further additions by statute laws, laying charge upon them of collecting taxation for the poor, for soldiers, and the like, and dealing without corruption, and the like.

Conservators of the peace in ancient times were certain which the King in every county did assign to see the peace maintained; and they were called to the office by the King's writ, to continue for term of their lives, [or at the King's pleasure.][1]

For this service, choice was made of the best men of calling in the country, and but few in a shire.

They might bind any man to keep the peace, and to good behaviour, by recognizance to the King with sureties; and might by warrant send for the party, directing their warrant to the sheriff or constable as they please, to arrest the party and bring him before them. This they used to do when complaint was made by any man that stood in fear of another, and so took his oath; or else, where the conservator did himself, without complaint, see the disposition of any man inclined to quarrel and breach of the peace, or to misbehave himself in some outrageous course of force or fraud, there by his own discretion he might send for such a fellow, and make him find sureties of the peace or good behaviour, as he should see cause; or else commit him to the gaol if he refused.

[1] This is omitted in Sloane MS.

The judges of the King's Bench[1] at Westminster, barons of the Exchequer, master of the rolls, and justices in eyre and assizes in their circuits, were all, without writ, conservators of the peace by their office in all shires of England, and so do continue to this day. But now conservators of the peace by writ are out of use; for that in lieu of them there are ordained justices of peace, assigned by the King's commission in every county, which are removeable at the King's pleasure; and the power of placing and displacing justices of the peace is by use delegated from the King to the Chancellor.

That there should be justices of peace by commission, it was first enacted by a statute made 1 Edward III. and their authority augmented by many statutes since made in every King's reign.

They are appointed to keep four sessions every year; that is to say, every quarter one. This session is a sitting time to assemble and dispatch the affairs of their commission. They have power to hear and determine in their sessions all felonies, breaches of the peace, contempts, and trespasses, so far as to fine the offender to the crown, but not to award recompence to the party grieved. They are to suppress riots and tumults; to restore possessions forcibly taken away, to examine all felons apprehended and brought before them; to see impotent poor people or maimed soldiers provided for according to the laws; and rogues, vagabonds, and beggars punished. They are to [license and[2]] suppress alehouses, badgers[3] of corn and victuals, and to punish forestallers, regrators, and engrossers.

Through these, in effect, run all the county services to the crown; as taxation of subsidies, mustering men, arming them, and levying forces by commission or precept from the King. Any of these justices, upon oath taken by a man that he standeth in fear that another will beat him, or kill him, or burn his house, are to send for the party by warrant of attachment directed to the sheriff or constable, and they are to bind the party with sureties by recognizance to the King to keep the peace, and also to appear at the next sessions of the peace. At

[1] The printed text and Sloane MS. have "either bench." It will be observed that the institution of the Common Pleas is described as subsequent.

[2] Harl. MS. has "to cease and suppress:" Sloane MS. omits the part in brackets. The licensing was not at common law but introduced by statute 5 and 6 Ed. VI. c. 25.

[3] Stat. 5 Eliz. c. 12.

which next sessions, when every justice of peace hath there delivered in all his recognizances so taken, then the parties are called and the cause of binding to the peace examined; and both parties being heard, the whole bench is to determine as they see cause, either to continue the party still bound, or to discharge him.

These justices at the sessions are attended with the constables and bailiffs of all hundreds and liberties within the county, and with the sheriff or his deputy, to be employed as occasion shall serve in executing the precepts and directions of the court. They proceed in this sort: the sheriff doth summon twenty-four discreet men, freeholders of the county; whereof some sixteen are selected and sworn, and have their charge to serve as the grand jury, to enquire and present all offences which the justices can deal in: to whom all persons grieved prefer Bills of Indictment; and they being found and presented by the grand jury, the party indicted is to traverse the indictment, which is to deny it to be true, or else to confess it, and so submit himself to be fined as the court shall think meet, regard had to the offence, except the punishment be certainly appointed, as often it is, by special Acts of Parliament.

The justices of peace are many in every county. And to them are brought all traitors, felons, and other malefactors of any sort upon their first apprehension in the county; and that justice to whom they are brought examineth them, and heareth their accusation, but judgeth not upon it; only if he find the suspicion but light, then he taketh bond with sureties of the accused to appear either at the next assizes, if it be matter of treason or felony, or else at the quarter sessions, if it be concerning riot, misbehaviour, or some other small offence. And he also bindeth to appear there and give testimony and prosecute the accusation all the accusers and witnesses; and so setteth the party at large. And at the assizes or sessions, as the case falleth out, he certifieth the recognizances taken of the accused, accusers, and witnesses, who being all there called, and appearing, the cause against the accused is dealt in according to law for his clearing or condemning.

But if the party apprehended seem, upon pregnant matter in the accusation and examination, to the justice to be guilty, and the offence heinous, or the offender taken with the *mainour*, then the justice is to commit the party by his warrant, called a *mitti-*

mus, directed to the gaoler of the common gaol of the county, there to remain until the assizes come. And then the justice must certify his accusation and examination, and return the recognizance taken for appearance and prosecution of the witnesses; so as the judges at the assizes may, when they come, readily proceed with him as the law prescribeth.

The judges of circuits as they be now, are come into the place of the ancient justices in eyre, called *justiciarii itinerantes*, by which the prime Kings after the Conquest, until Hen. III.'s time especially, and after that, in lesser measure, even to Rich. II., did execute the justice of the realm.

They began in this sort:

The King, not able to dispatch matters in his own person, erected the Court of King's Bench: that not able to do all, nor meet to draw the people all to one place, there were ordained counties and then sheriff's turns, hundred courts, and particular leet, and law-days, as is before mentioned; which dealt only with crown matters for the public, but not with private titles of lands or goods, nor the trial of grand offences of treasons and felonies. But all the counties of the realm were divided into six circuits, and two learned men well read in the laws and customs of the realm were assigned by the King's commission to every circuit, to ride twice a year through those shires allotted that circuit, making proclamation beforehand a convenient time, in every county, of the time of their coming and place of their sitting, to the end the people might attend them in every county of the circuit. They were to stay three or four days in every shire, and in that time all the causes of the county were brought before them by the parties grieved, and all the prisoners in the gaols in every shire, and whatsoever controversies arisen concerning life, liberty, lands, or goods.

The authority of these justices in eyre is [in part][1] transferred by act of parliament to justices of assize, which be now the judges of circuits; and they do use the same course that justices in eyre did, to proclaim their coming every half year, and the place of their sitting.

The business of the justices in eyre, and of the justices of assize at this day, is much lessened; for that, in Hen. III.'s time, there was erected the Court of Common Pleas at Westminster; in which court have been ever since, and yet are,

But the statute of *Mag. Char. cap.* 11. is negative against it: *viz. Communia placita non sequantur*

[1] Omitted, Sloane MS.

curiam nostram, sed teneantur in aliquo loco certo; which *locus certus* must be the Common Pleas.[1]

begun and handled the great suits of lands, debts, covenants, benefices, and contracts, and fines and recoveries for assurance of lands, which were wont to be either in the King's Bench, or else before the justices in eyre. Yet the judges of circuits now have five commissions by which they sit.

One is a commission of oyer and terminer, directed unto them and many others of the best account in the circuits, selected out of all the counties of their precincts; but in this commission the judges are of the *quorum*, so as without them there can be no proceeding. This commission giveth them power to deal with treasons, murders, and all manner of felonies, offences, and misdemeanors whatsoever; and this is the largest commission of all they have.

One other is a commission of gaol delivery, that is only to the judges themselves, [and the clerk of the assizes associated to them][2]: and by this commission they are to deal with every prisoner in the gaol, for what offence soever he be there, to proceed with him according to the laws of the realm and the quality of his offence. And they cannot by this commission do any thing concerning any man but those that are prisoners in the gaol.

The course now in use of execution of this commission of gaol delivery is this. There is no prisoner but is committed by some justice of peace, who, before his committing, took his examination, and bound his accusers and witnesses to appear and prosecute at the gaol delivery. This justice doth certify these examinations and bonds; and thereupon the accuser is called solemnly in the court, and when he appeareth he is willed to prepare a bill of indictment against the prisoner, and go with it to the grand jury, and give evidence upon their oaths, he and the witnesses: which he doth; and the grand jury do thereupon write either *billa vera*, and then the prisoner standeth indicted, or else *ignoramus*, and then he is not touched. The grand jury deliver these bills to the judges in open court; and so many as they find indorsed *billa vera*, they send for those prisoners, and they read every man's indictment unto him, asking him whether he be guilty or not: if he say he is, then his confession is recorded down; if he say Not guilty, then he is asked how he

[1] This, which in the MSS. and editions stands as part of the text, before the sentence "yet the judges, &c.," is obviously a note correcting it.

[2] Omitted in Sloane MS.

will be tried; he answereth, By the country; and then the sheriff is commanded to return the names of twelve freeholders to the court, which freeholders be sworn to make true delivery between the King and the prisoner; and then the indictment is again read, and the witnesses sworn and do speak their knowledge concerning the fact, and the prisoner is heard at large what defence he can make, and then the jury go together and consult; and after a while they come in again with a verdict of Guilty or Not guilty, which verdict the judges do record accordingly. If any prisoner plead that he is Not guilty upon the indictment, and yet will not put himself to trial by the jury, he is to be pressed to death.

These judges, where many prisoners are in the gaol, do in the end, before they go, peruse every one. Those that were indicted by the grand jury and found not guilty by the petty jury, they judge to be acquitted, and so deliver them out of the gaol. Those that are found guilty by both juries they judge to death, and command the sheriff to see execution done. Those that refuse trial by the country, they judge to be pressed to death. Some, whose offences are pilfering under twelvepence value, they judge to be whipped. Those that confess their indictments, they judge to death, whipping, or otherwise, as their offence requireth. And those that are not indicted at all, but the bill of indictment returned with *ignoramus* by the grand jury, and all other in the gaol against whom no bills at all are preferred, they do acquit by proclamation: that is, they first make proclamation, that if any man can say any thing against them they shall be heard; but, no man coming in, then the judges are to declare all these acquitted by proclamation out of the gaol. So that one way or another they rid the gaol of all the prisoners in it.

But because some prisoners that can read have their books, and be burned in the hand and so delivered, it is necessary to show the reason thereof. This having their books is called their clergy, which in ancient time began thus.

For the scarcity of men that could read, and the multitude requisite in the clergy of the realm to be disposed into religious houses, priests, deacons, and clerks of parishes, there was a prerogative allowed to the clergy that if any man that could read as a clerk were to be condemned to death, the bishop of the diocese might, if he would, claim him as a clerk; and he

was then to see him tried in the face of the court, whether he could read or not. The book was prepared and brought by the bishop, and the judge was to turn to some place as he should think meet; and if the prisoner could read, then the bishop was to have him delivered unto him to dispose in some place of the clergy, as he should think meet: but if either the bishop would not demand him, or that the prisoner could not read, then was he to be put to death.

And this clergy was allowable in the ancient times and law, for all offences except treason, and robbing churches of their goods and ornaments. But by many statutes made since the clergy is taken away for murder, burglary, robbery, purse-cutting, horse-stealing, and divers other felonies particularized by the statutes to the judges; and lastly, by a statute made 18 Eliz., the judges themselves are appointed to allow the clergy to such as can read, being no offenders from whom clergy is taken away by any statute, and to see them burned in the hand, and so discharge them without delivering them to the bishop; howbeit the bishop appointeth the deputy to attend the judges with a book to try whether they can read or not.

The third commission that judges of circuits have, is a commission, directed to themselves only [and the clerk of assize][1] to take assizes; by which they are called justices of assize. And the office of those justices is to do right upon writs called assizes, brought before them by such as are wrongfully thrust out of their lands: of which the number was much greater in ancient times than now; the rather for that men's seisins and possessions are sooner recovered by sealing leases upon the ground and bringing an *ejectione firmæ*, than by the long suit of assize.

The fourth commission is a commission to take *Nisi Prius*, directed to none but to the judges themselves and their clerks of assizes; by which they are called justices of *Nisi Prius*. These *Nisi Prius* happen in this sort; when a suit is begun for any matter in one of the three courts of King's Bench, Common Pleas, or Exchequer, here above, and the parties in their pleadings do vary upon a point of fact; as for example, if in an action of debt upon obligation the defendant denies the obligation to be his deed; or in any action of trespass grown for taking away goods the defendant denieth that he took them; or in an

[1] Omitted in Sloane MS.

action of the case for slanderous words, the defendant denieth that he spake them, &c.; then the plaintiff is to maintain and prove that the obligation is the defendant's deed, or that he took the plaintiff's goods, or spake those slanderous words: upon which denial and affirmation the law saith that issue is joined between them; which issue of the fact is to be tried by a jury of twelve men of the county where it is supposed by the plaintiff to be done, and for that purpose the judges of the court do award in the King's name a writ to the sheriff of that county called a *venire facias*, commanding him to cause to come before them four and twenty freeholders of his county, at a certain day, to try this issue so joined; out of which four and twenty only twelve are chosen to serve: and that double number is returned, because some may make default, and some be spared upon challenge of kindred, alliance, or partial dealing. These four and twenty the sheriff doth name and certify to the court, and withal that he hath warned them to come at the day appointed according to the writ. But because at this first summons there falleth no punishment upon these four and twenty if they come not, they seldom or never appear upon the writ; and upon their default there is another writ to the sheriff, commanding him to distrain them by their lands to appear at a certain day appointed by the writ, (which is the next term after,) *Nisi prius justiciarii nostri ad assizas capiendas in comitatu venerint*, &c. of which words the writ is called a *Nisi Prius*. And the judges of the circuit which in truth do ride the circuit in that county in that vacation and mean time, before the day of appearance appointed for the jury above, have, by their commision of *Nisi Prius*, authority to take the appearance of the jury in the county before them, and there to hear the witnesses and proofs on both sides concerning the issue of fact, and to take the verdict of the jury, and, against the day they should have appeared above, to return the verdict ready in the court, which return is called a *postea*. And upon this verdict, clearing the fact one way or other, the judges above give judgment for that party for whom the verdict is found, and for such damages and costs as the jury do assess.

By the trials called *Nisi Prius* the juries and parties are eased of much charge which they should be put to by coming to London with their evidences and witnesses, and the courts at Westminster are eased of great trouble that they should have, if

all juries for trials should appear and try the causes in those courts: for the courts above have little ease or leisure now, although the juries come not up. Yet in matters of great weight, or where the title is intricate or difficult, the judges above upon information to them do retain those causes to be tried here and the juries do at this day in such cases come to the bar at Westminster.

The fifth commission that the justices in the circuits do sit by is the commission of the peace in every county of their circuit.

And all justices of the peace, having no lawful impediment, are bound to be present at the assizes to attend the judges as occasion shall fall out: and if any make default, the judges may set a fine upon them at their pleasure and discretions. Also the sheriff in every shire through the circuit is to attend in person, or by sufficient deputy allowed by the judges, all the time that they be within the county; and the judges may fine him if he fail; and so they may fine him for negligence or misbehaviour in his office before them: and the judges above may also fine the sheriff for not returning, or not sufficient returning, of writs before them.

Property in Lands is gotten and transferred: 1, By entry; 2, by descent; 3, by escheat; 4, [and most usually][1] by conveyance.

I. Property by entry is where a man findeth a piece of land that no other possesseth nor hath title unto, and he that so findeth it doth enter upon it; this entry gaineth the property. This law seemeth to be derived from the text *Terram dedit filiis hominum*, which is to be understood, to those that will till and manure, and so make it yield fruit; and that is he that entereth into it, where no man had it before.

But this manner of gaining lands was in the first days, and is not now in use in England; for that by the conquest all lands in this nation were appropriated to the Conqueror, except religious and church-lands, and the lands of Kent, which by composition were left to the former owners, as the Conqueror found them; so that no man but the bishops, churches, and men of Kent can at this day make any higher title than from the conquest to any lands in England; and lands possessed

[1] Omitted in Sloane MS.

without such title are in the crown, and not in him that first entereth. As it is with land left by the sea, that was part of the sea: this land belongeth to the crown, and not to him that hath the land next adjoining, which was the ancient sea-bank.

This is to be understood of the inheritance of lands; *viz.* that the inheritance cannot be gained by first entry. Yet an estate for another man's life may, by our laws, at this day, be gotten by first entry. As if a man called A. having land conveyed unto him for the life of B., dieth without making any estate of it; there, whosoever first and next entereth into the land after the decease of A. getteth property in the land for the time of the continuance of that estate which was granted to A. *viz.* for the life of B. The reason whereof is, because no man can make title of this land: for the first grantor hath let it out to A. for the life of B., which B. yet liveth, and therefore the land cannot revert to him till B. die; and to the heir of A. it cannot go, for it is not any estate of inheritance, but only an estate for another man's life, which is not descendible to the heir, except he be specially named in the grant: *viz.* to him and his heirs; as for the executors of A. they cannot have it; for it is not an estate testamentary, that it should go to executors as goods and chattels. So as in truth no man can entitle himself unto the lands; and therefore the law preferreth him that first entereth, and he is called *occupans*, and shall hold it during the life of B. but must pay the rent, perform the conditions, and do no waste. And he may by deed assign it to whom he will in his life time; but if he die without assigning then it shall go again to whosoever first entereth and holdeth; and this all the life of B., so often as it shall happen.

[1] Likewise if any man doth wrongfully enter into another man's possession and put the right owner of the freehold and inheritance from it, he thereby getteth the freehold and inheritance by disseisin, and may hold it against all men but him that hath right and his heirs, and is called a disseisor. Or if one die seised of lands, and, before his heir doth enter, one that hath no right doth enter into the lands, and holdeth them from the right heir, he is called an abator, and is lawful owner against all men but the right heir.

And if such person, abator or disseisor, (so as the disseisor hath quiet possession five years next after the disseisin,) do con-

[1] The rest of this title is omitted in Sloane MS.

tinue their possession, and die seised, and the land descend to his heir, they have gained the right to the possession of the land against him that hath right till he recover it by fit action real at the common law. And if it be not sued for at the common law within threescore years after the disseisin or abatement committed, the right owner hath lost his right by that negligence.

And if a man hath divers children, and the elder, being a bastard, doth enter into the land and enjoyeth it quietly during his life, and dieth thereof so seised, his heirs shall hold the land against all the lawful children and their issues.

II. Descent of lands is where a man that hath land of inheritance dieth, not making any disposition of it, but leaveth it to go as the law appointeth: the law casteth it upon the heir. This is called a descent of land; but which shall be heir to inherit the land, upon whom the descent is to alight, is the question.

For which purpose the law of inheritance preferreth the child first before all others, and amongst children the male before the female, and amongst males the first born: if there be no children, then brothers: if no brothers, then sisters: if neither brothers nor sisters, then uncles, and for lack of uncles, aunts: if none of them, then cousins in the nearest degree of consanguinity:—with these three rules of diversities. Firstly, that the eldest male shall solely inherit; but if it come to females, then the females, being all equal in degree of nearness, shall inherit all together, and they are called parceners, and all they make but one heir. Secondly, that no brother or sister of the half-blood shall inherit to his brother or sister; but a child shall to his parents. As for example, if a man have two wives, and by either wife a son; the eldest son overliving the father is to be preferred to the inheritance being fee-simple; and if he enter and die without a child, the brother shall not be his heir, because he is of the half-blood to him, but the uncle of the eldest son or sister of the whole blood: but if the eldest brother had died in the life of the father, or had not entered after his father's death, then the youngest son should as heir to his father inherit the land his father had (although he were a child of the second wife), before any daughter of the first. Thirdly, that land purchased, either by such entry or conveyance, by the party himself that dieth is to be inherited, first, by the heirs of

his father's side, and if he have none of that part, then by the heirs of his mother's side; but lands descended to him from his father or mother are to go to that side only from which they came, and never to the other side.

These rules [of descent] before mentioned are to be understood of fee-simples, and [not of][1] entailed lands. And these rules are restrained by some particular customs of particular places: as namely, by a custom of Kent, that every male of equal degree of childhood, brotherhood, or kindred, shall inherit equally (as daughters shall, called parceners); and in many boroughs of England the custom alloweth the youngest son to inherit, and so the youngest brother. The custom of Kent is called gavelkind: the other in boroughs, is called Borough-English.

And there is another note to be observed in fee-simple inheritance, and that is, that every heir having any fee-simple land or inheritance, by common law or custom of either gavelkind or Borough-English, is chargeable so far as the value thereof extendeth, with the binding acts of the ancestors from whom the inheritance descended. And these acts are called encumbrances; and the reason of this charge is, *Qui sentit commodum, sentire debet et incommodum sive onus.*

As for example, if a man do bind himself and his heirs in an obligation, or do covenant by writing for him and his heirs, or do grant an annuity for him and his heirs, or do make a warranty of land, binding him and his heirs to warrant: in all these cases the heir is chargeable after the death of his ancestor with this obligation, covenant, annuity, and warranty; yet with these three cautions. First, that the party must by special name bind him and his heirs, or covenant, grant, or warrant for him and his heirs; otherwise the heir is not to be touched. Secondly, that some action must be brought against the heir whilst the land or other inheritance resteth in him unaliened away: for if the ancestor die, and the heir, before any action brought against him upon those bonds, covenants, or warranties, do alien away the land, then the heir is clean discharged of the burden; except the land were by fraud conveyed away of purpose to prevent the suit intended to be brought against him.

[1] Harl. MS. omits the words in brackets in both places. In truth, neither reading of the passage gives a very good meaning. The rules require modification when applied to entails, but can hardly be said to be totally inapplicable.

Thirdly, that no heir is to be charged farther than the value of the land descended unto him from the same ancestor that made the instrument of charge; and that land also not to be sold outright, but to be kept in extent, at a yearly value, until the debt or damage be run out. Yet nevertheless if an heir that is sued upon such a debt of his ancestor do not deal clearly with the court when he is sued; that is, if he do not come in, and set down by way of confession the true quantity of his inheritance descended, and submit himself therefore as the law requireth, then that heir that otherwise demeaneth himself shall be charged of his own lands and goods, and of his money, for the deed of his ancestor. As for example; if a man bind himself and his heirs in an obligation of one hundred pounds, and dieth, leaving but ten acres of land to his heir; if his heir be sued upon the bond, and he cometh in, and denieth that he hath any lands by descent, and it is found against him by the verdict that he hath ten acres, this heir shall now be charged by his false plea of his own lands, goods, and body, to pay the hundred pounds, although the ten acres be not worth ten pounds.

III. Property by escheat is where the owner of the land dieth in possession without child or other heir; there the land, for lack of heir, is said to escheat to the lord of whom it is holden.

This lack of heir happeneth principally in two cases: the one where the land owner is a bastard; the other where he is attainted of felony or treason. For neither can a bastard have an heir, except it be his own child, nor a man attainted have any heir although it be his own child.

Upon attainder of treason the King is to have the land, although he be not the lord of whom it is holden, because it is a royal escheat. But for felony it is not so; for there the King is not to have the escheat except the land be holden of him: and yet, where the land is not holden of him, the King is to have the land for a year and a day next ensuing the judgment of attainder, with a liberty all that year to commit all manner of waste in houses, gardens, ponds, lands, and woods.

In these escheats two things are especially to be observed; the first is the tenure of the lands, because that directeth the person to whom the escheat belongeth, *viz.* the lord of whom the land is holden; the other is the manner of such attainder as draweth with it the escheat.

Concerning the tenure of lands, it is to be understood that all lands are holden of the crown, either mediately or immediately, and that the escheat appertaineth to the immediate lord, and not to the mediate. The reason why all land is holden of the crown, immediately or by mesne, is this:

The Conqueror got, by right of conquest, all the land of the realm into his own hands, in demesne, taking from every man all estate, tenure, property, and liberty of or in the same, except religious and church lands, and the lands of Kent: and still as he gave any of it out of his own hand, he did reserve some retribution of rents, or services, or both, to him and his heirs, which reservation is that which is called the tenure of the land.

In which reservation of tenure he had four institutions, exceeding politic, and suitable to the state of a conqueror.

First, seeing his people to be part Normans, brought by him, and part Saxons, found here, he bent himself to conjoin them in amity by marriages; and for that purpose ordained, that if those of his nobles, knights, and gentlemen, to whom he gave great rewards of lands, should die, leaving their heir within age, a male within twenty-one, a female within fourteen years, and unmarried, then the King should have the bestowing of such heirs in marriage, in such family and to such persons as he should think meet; which interest of marriage went still implied, and doth so at this day, in every tenure of land called knight-service.

The second was, to the end his people should still be conserved in warlike exercises and able for his defence, when he gave any good portion of land that might make the party of ability and strength he withal reserved this service, that the party and his heirs having this land should keep a horse of service continually, and serve himself upon him when the king went into war; or else, having impediment to excuse his own person, should find another to serve in his place; which service of horse and man is a part of the tenure called knight-service at this day. And the tenant himself being an infant, the King is to hold the land himself until his full age, finding him meat, drink, apparel, and other necessaries, and to find a man and horse with the overplus, to serve in the wars as the tenant himself should do if he were of full age. But if this inheritance descend upon a woman that cannot serve by her sex, yet the King is not to have the lands, she being of fourteen years of

age, because she is then able to have a husband that may do the service in person.

The third institution was, that upon every gift of land he reserved as part of the tenure a vow and an oath to bind the party to his faith and loyalty: the vow was called homage, the oath fealty. Homage is to be done kneeling, holding his hands between the King's, saying, in the French tongue, "I become your man of life and limb, and of earthly honour." Fealty is to take an oath upon a book that he will be a faithful tenant to him, and do his service, and pay his rents according to his tenure.

The fourth institution was, that for recognition of the King's bounty by every heir succeeding his ancestor in these knight-service lands, the King should have *primer seisin* of the land, which is one year's value of the land; and until this be paid the King is to be in possession of the land, and then to deliver it to the heir; which continueth in use until this day, and is the very cause and business of suing livery, and is as well where the heir hath been in ward as otherwise.

These beforementioned be the rights of the tenure called knight-service *in capite*, which is as much as to say tenure *de persona regis*, and *caput* being the chiefest part of the person, it is called a tenure *in capite*, or in chief.

And it is also to be noted, that as this tenure *in capite* by knight-service generally was a great safety to the crown, so also the Conqueror instituted other tenures *in capite* necessary for his state. As namely, he gave divers lands to be holden of him by some special service about his person, or by bearing some special office in his house, or in the field, which have knight-service and more included in them; and these be called tenures by grand serjeanty. Also he provided, upon the gift of lands, to have a reservation of continual service of ploughing his land, repairing his houses, park-pales, castles, and the like; and sometimes to have a yearly provision of gloves, spurs, hawks, horses, hounds, and the like; which kind of reservations be called also tenures in chief, or *in capite*, of the King; but they are not by knight-service; because they require no personal service, but only such things to be done as the tenant may hire another to do, or provide for his money. And this tenure is called a tenure *in capite* by socage, the word *soca* signifying the plough. Howbeit, in this latter time the service of ploughing the land is turned into money rent, and so of harvest works;

for that the Kings do not keep their demesne in their hands as they were wont to do: yet what lands were *de antiquo dominico coronæ* well appeareth in the records of the Exchequer, called the Book of Doomsday. And the tenants be now called tenants in ancient demesne, and have many immunities and privileges at this day that in ancient times were granted to those tenants by the crown; the particulars whereof are too long to set down.

[1] These tenures *in capite*, as well that by socage as the others by knight-service, have this property; that the tenants cannot alien their lands without license of the King; if they do, the King is to have a fine for the contempt, and may seize the land and retain it until the fine be paid. And the reason of this seemeth to be, for that the King would have a liberty in the choice of his tenant; so that no man should presume to enter into those lands and hold them, for which the King was to have those special services done him, without the King's leave.

This license and fine as it is now digested is easy and of course. There is an office called the Office of Alienations; where any man may have a license at a reasonable rate, that is, at the third part of one year's value of the land; and if there be an alienation without license, then in this office the party may compound for his fine at one's year's value of the land, moderately rated.

A tenant *in capite* by knight-service or grand serjeanty was restrained by an ancient statute, that he should not give nor alien away more of his lands than that with the rest he might be able to do the service due to the King; but this is now out of use.

And to this tenure by knight-service in chief was incident, that the King should have a sum of money, called aid, to be ratably levied amongst all those tenants proportionably to their lands, to make his eldest son a knight, or to marry his eldest daughter.

And it is to be noted, that all those that hold lands by the tenure of socage *in capite*, although not by knight-service, cannot alien without license; and they are to sue livery, and pay *primer seisin*, but not to be in ward for body or land.

By example and resemblance of the King's policy in these institutions of tenures, the great men and gentlemen of the

[1] This paragraph is omitted by Harl. MS. It does not stand well with some of the succeeding paragraphs, and we probably have a mixture of two different recensions.

realm did the like as near as they could; as for example, when the King had given to any of them two thousand acres of land, this party, purposing in this place to make his dwelling, or, as the old word is, his mansion or his manor house, (of *maneo* and thence *manerium*,) did devise how he might make his land a competent habitation to supply him with all manner of necessaries; and for that purpose, first, he would give of the uttermost parts of these two thousand acres, one hundred or two hundred acres, more or less as he should think meet, to some of his own trusty servants, (with some reservation of rent,) to find a horse for war, and go with him when he went with the King to the wars, adding the vow of homage, the oath of fealty, wardship, marriage, and relief. This relief is to pay five pounds for every knight's fee, or after that rate for more or less, at the entrance of every heir. Which tenant so created and placed was, and is to this day, called a tenant by knight-service, not of his own person, but of his manors. Of these he might make as many as he would.

Then this lord would provide that the land which he was to keep for his own use should be ploughed, and his harvest brought home, his house repaired, or his park paled, or the like: and for that end he would give some less parcels to sundry others, of twenty, thirty, forty, or fifty acres; reserving the service of ploughing, either a certain quantity, or so many days, of his land, and certain harvest works or days in harvest to labour, or to repair the house, park-pale; or otherwise to give him, for his provision, capons, hens, pepper, cummin, roses, gilliflowers, spurs, gloves, or the like; or to pay him a certain rent; and to to be sworn to be his faithful tenant; which tenure was called a socage tenure, and is so to this day; howbeit most of the ploughing and harvest services are turned into money rents. These tenants, at the death of every tenant, were to pay a relief, which was not, as knight-service is, five pounds a knight's fee; but it was, and so is still, one year's rent of the land; and no wardship or other profit to the lord.

The remainder of the two thousand acres, which he kept to himself, he used to manure by his bondmen, and appointed them at the courts of his manor how they should hold it, making an entry of it into the roll of the remembrances of the acts of his court; yet still in the lord's power to take it away: and therefore they were called tenants at will, by copy of court roll;

being in truth bondmen at the beginning; but having attained freedom of their persons, and gained a custom by use in occupying their lands, they are now called copyholders, and are so privileged by this custom as that the lord cannot put them out. Some copyholders are for the life of one, two, or three successively; some inheritances from heir to heir by custom; and custom ruleth these estates wholly, both for widows' estates, fines, heriots, forfeitures, and all other things.

Manors being in this sort at the first made, it grew out of reason that the lord of the manor should hold a court; which is no more than to assemble his tenants at times by him to be appointed; in which court he has to be informed, by oath of his tenants, of all such duties of rents, reliefs, wardships, copyholds, or the like, that had happened unto him; which information is called a presentment; and then his bailiff was to seize and distrain for those duties, if they were denied or withholden. This court is called a court baron: and herein a man may sue for any debt or trespass under forty shillings value, and the freeholders are to judge of the cause upon the proofs produced on both sides. And therefore the freeholders of these manors, as incident to their tenure, do hold by suit of court; which is, to come to the court, and there to judge between party and party in these petty actions, and also to inform the lord of duties of rents, and services unpaid to him from his tenants.

By this discourse it is discerned who be the lords of lands such as, if the tenants die without heir or be attainted of felony, shall have the land by escheat.

Now, concerning what attainders shall give the escheat to the lord, it is to be noted, that it must be either by judgment of death, pronounced in some court of record against the felon found guilty, by verdict or confession, of the felony; or it must be by outlawry of him.

This outlawry groweth in this sort: a man is indicted for felony, being not in hold, so as he cannot be brought in person to his trial; so as therefore process of *capias* is awarded to the sheriff to take him; who finding him not, returneth *non est inventus in balliva mea;* and thereupon another *capias* is awarded to the sheriff, who likewise, not finding him, maketh the like return; then a writ which is called an *exigent* is directed to the sheriff, commanding him to proclaim him in his county court five several court days, to yield his body; which if the

sheriff do, and the party yield not his body, then he is, by that default, said to be outlawed; the coroners adjudging him there outlawed, and the sheriff making return of the proclamations and of the judgment of the coroners upon the back side of the writ. This is an attainder of felony, whereupon the offender doth forfeit his lands, by an escheat, to the lord of whom they be holden.

But note, that a man found guilty by verdict or confession, and praying his clergy, and thereupon reading as a clerk, and so burnt in the hand and discharged, is not attainted; because he by his clergy preventeth judgment of death, and is called a clerk convict, who loseth no lands, but all his goods, chattels, leases, and debts.

So a man indicted that will not answer, nor put himself upon trial, although he by this have judgment to be pressed to death, yet he doth forfeit no lands, but goods, chattels, leases, and debts; except his offence be treason, and then he forfeiteth his lands to the crown.

So a man that killeth himself loseth no lands, but his goods, chattels, leases, and debts. So of those that kill others in their own defence, or by misfortune.

A man that, being pursued for felony, flyeth for it, loseth his goods for his flying, although he return and be tried, and found not guilty of the fact.

So a man indicted of felony, if he yield not his body to the sheriff until after the exigent for proclamation be awarded against him, this man doth forfeit his goods for his long tarryance, although he be found not guilty of the felony. But none is attainted to lose his lands, but such as have judgment of death upon trial, by verdict or their own confession, or else that they be by judgment of the coroners outlawed as before.

Besides these escheats of lands to the lords of whom they be holden for lack of heirs, and by attainder for felony, which only do hold place in fee-simple lands, there are also forfeiture of lands by attainder to the crown. As namely, if one that hath entailed lands commit treason, he forfeiteth his lands to the crown, by a statute made 26 H. VIII. But if he commit felony he forfeiteth only the profits of his lands for his life to the crown, but not to the lord.

And if a man, having an estate for life only of himself or of another, commit treason or felony, the whole estate is forfeited to the crown; but no escheat to the lord.

But all copyhold of fee-simple or for life is forfeited to the lord and not to the crown; and if it be entailed, the lord is to have it during the life of the offender only, and then his heir is to have it.

The custom of Kent is, that gavelkind land is not forfeited nor escheated for felony; for they have an old saying, "the father to the bough, and the son to the plough."

If the husband was attainted, the wife was to lose her thirds in cases of felony and treason both; yet she is no offender. But, at this day, it is holpen by statute law that she loseth them not for her husband's felony.

The relation of these forfeitures are these: First, that men attainted of felony or treason by verdict or confession do forfeit all the lands they had at the time of the offence committed; and the King or lord, whichsoever of them hath the escheat or forfeiture, shall come in and avoid all leases, statutes, conveyances, or incumbrances done by the offender at any time since the offence done. And so is the law also clear, if a man be attainted for treason by outlawry. But upon attainder of felony by outlawry, it hath been much questioned in law books whether the lord's title by escheat shall reach back to the time of the offence done, or only of the date or test of the writ of exigent for proclamation whereupon he is outlawed: howbeit, at this day it is ruled that it shall reach back to the time of his fact. But for goods, chattels, and debts, the King's title shall look no further back than to such goods as the party attainted by verdict or confession had at the time of the verdict or confession given or made, and in outlawries at the time of the date of the exigent, as well in treasons as felonies. Wherein it is also to be observed that, upon the party's first apprehension, the King's officers may seize all his goods and chattels and preserve them together, dispending only so much out of them as is fit for sustentation of the party in prison, without wasting or disposing them, until conviction: and then the property of them is in the crown, and not before.

It is also to be noted, that persons attainted of felony or treason have no capacity to take, obtain, or purchase, save only to the use of the King, until they be pardoned. And the pardon giveth not back the lands or goods forfeited without a special patent of restitution; and such patent of restitution cannot restore the blood without an act of parliament. So that if a

man have a son, and then is attainted of felony or treason and pardoned, and purchaseth lands, and then hath another son, and dieth; the son he had before his pardon, although he be his eldest son and the patent have words of restitution of his lands, shall not inherit this land, but his second son shall: and for the land he had before his pardon and is restored, also the second son shall inherit it, and not the first; because the blood betwixt him and the first is corrupted by the attainder and cannot be restored by patent alone, without act of parliament. And if a man have two sons, and the eldest is attainted in the life of his father and dieth without issue, the father living, the second son shall inherit the father's lands; but if the eldest son leave any issue, though he die in the life of his father, then neither the second son, nor the issue of the eldest, shall inherit the father's lands, but the father there shall be accounted to die without heir, and the land shall escheat; and if the eldest son outlive the father, then the land shall escheat whether the eldest son have issue or not, afterward or before, though he be pardoned after the death of his father.

IV. Properties of lands by conveyance are distributed into divers estates, viz. for years, for life, in tail, and fee-simple.

These estates are created by word, by writing, or by record.

1. For estates of years, which are commonly called leases for years, they are thus made where the owner of the land agreeth with another by word of mouth, that this other shall hold and enjoy the land, or take the profits of it, for a time certain of years, months, or days, agreed between them; and this is called a lease parol. Such a lease may also be made by writing poll, or by writing indented by words of *demise, grant, and to farm let;* and so also by fine of record; but whether any rent be reserved or no, it is not material. Unto these leases there may be annexed such exceptions, conditions, and covenants, as the parties can agree on. They are called chattels real, and are not inheritable by the heirs, but go to the executors or administrators; they be saleable for debts in the life of the owner, or in the executors' or administrators' hands, by writs of execution upon statutes, recognizances, and judgments of debts or damages. They be forfeitable to the crown by outlawry, by attainder of treason, felony, or premunire, by killing himself, flying for felony although not guilty of the fact, standing mute

or refusing to be tried by the country, by conviction of felony by verdict without judgment, petty larceny, or going beyond the sea without license.

Of like nature as leases for years are interests gotten in other men's lands, by extending for debt upon judgment in any court of record, statute merchant, statute staple, or recognizances, (which being upon statutes are called tenants by statute merchant, or staple; — the other tenants by *elegit*,) and by wardship of body and lands: for all these are also called chattels real, and do go to executors and administrators and not to the heirs, and are saleable and forfeitable as leases for years are.

2. Leases for lives are called freeholds. They may also be made by word, writing, or record: if by word or writing there must be livery and seisin given at the making of the lease; which livery and seisin is done in this manner: the maker of the lease which we call the lessor, cometh to the door, back side, or garden, if it be a house, — if not, then to some part of the land, — and there expresseth, that he doth grant it to the taker, called the lessee, for term of his life, and, in seisin thereof, he delivereth to him a turf, or twig, or ring of the door: and if the lease be by writing, then commonly there is a note written on the back side of the lease with the witnesses' names. This estate for life is not saleable by the sheriff for debt, but the land is to be extended at a yearly value to satisfy the debt. It is not forfeitable for outlawry, except in felony, nor by any of the means before mentioned of leases for years, saving attainders for felony, treason, or premunire; and then only to the crown, not to the lord by escheat.

And though a nobleman or other have liberty by charter to have all felons' goods; yet a tenant holding for term of life, being attainted of felony, doth forfeit to the King, and not to this nobleman.

If a man have an estate in lands for another man's life, and dieth; this land cannot go to his heir, nor to his executors, but to the party that first entereth; and he is called an occupant, as before in the former part of this discourse is declared.

A lease for years or for life, may also be made by fine of record, or bargain and sale, or covenant to stand seised upon good consideration of marriage or blood: the reasons whereof are hereafter expressed.

3. Entails of lands are created by a gift, with livery and

seisin, to a man and the heirs of his body. The word "body" (making the entail) may be demonstrated or restrained to males or females, heirs of their two bodies, heirs of the body of his father or grandfather.

Entails began by a statute made in Edw. I.'s time; by which also they are so much strengthened, as the tenant in tail could not put away the land from the heir by any act of conveyance or attainder, nor let it nor encumber it longer than his own life.

But the inconvenience thereof was great; for by that means, the land being so sure tied upon the heir as his father could not put it from him, it made the son to be disobedient, negligent, and wasteful, often marrying without the father's consent, and to grow insolent in vice knowing that there could be no check of disinherison over him. It also made the owners of land less fearful themselves to commit murders, felonies, treasons, and manslaughters; for that they knew none of these acts could hurt the heir in his inheritance. It hindered men that had entailed lands, that they could not make the best of their lands by fine and improvement; for that none, upon so uncertain an estate as for term of his own life, would give him a fine of any value, nor lay any great stock upon the land that might yield rent improved: and lastly, these entails did defraud the crown and many subjects of their debts; for that the land was not liable longer than his own life time; which made that the King could not safely commit any office of account to such whose lands were entailed, nor other men trust them with loans of money.

These inconveniences were all remedied by acts of parliament later than the act of entails; as namely, by statutes made 4 H. VII. and 32 H. VIII., a tenant in tail may disinherit his son by a fine with proclamation, and may by that means also make it subject to his debts and sales; by a statute made 26 H. VIII. a tenant in tail doth forfeit his lands for treason; and by another statute, 32 H. VIII. he may make leases good against his heir for one and twenty years, or three lives, so it be not of his chief houses, lands, or demesne, nor a lease in reversion, nor less rent reserved than the tenants have paid most part of one and twenty years before, nor having any manner of discharge for doing wastes or spoils; and by a statute made 33 H. VIII. tenants of entailed lands are liable by extent for the King's debts;

and by statutes made 13 and 39 Eliz. they are saleable for the arrearages upon his account for his office. So that it resteth only that entailed lands have now these two privileges: not to be forfeited for felonies, nor to be extended for debts after the party's death, except the entail be cut off by fine and recovery.

But it is to be noted, that since these notable remedies provided by the statute to dock entails, there is started up a device called perpetuity; which is an entail with an addition of a proviso conditional, tied to his estate, not to put away the land from the next heir; and if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences of entails, that were cut off by the former mentioned statutes; and far greater: for, by the perpetuity, if he that is in possession start away never so little, in making a lease, or selling a little quillet, forgetting after two or three descents, as often they do, how they are tied; the next heir must enter, who peradventure is his son, his brother, uncle, or kinsman: and this raiseth an unkind suit, setting all the kindred at jars, some taking part with one side, some with the other, and the principals wasting their time and money in suits of law: so that in the end they are both constrained by necessity to join together to sell the land or a good part of it, to pay the debts occasioned through their suit. And if the chief of the family, for any good purpose of well seating himself, by selling that which lieth far off to buy nearer, or for the advancement of his daughters or younger sons, should have just and reasonable cause to sell; there this perpetuity, if it should hold good, restraineth him. And more than that, where men that are owners of the inheritance of land not entailed may, during the minority of the eldest son, appoint the profits to go to the advancement of the younger sons and daughters, and to pay debts; by entails and perpetuities the owners of these lands cannot do it, but they must suffer the whole to descend to the eldest son, and so to come to the crown by wardship all the time of his infancy. And where men, foreseeing dangerous times or untowardly heirs, might prevent the mischief of undoing their houses by conveying their lands out of them, or from such heirs, they are by the perpetuity tied; so as they stand tied to the stake for forfeiture to the crown, and restrained from disposing it to their own, or to their children's, good. Therefore it is worthy of good consideration, whether

it be better for the subject and sovereign to have lands secured to men's names and blood by perpetuities, with all the inconveniences abovementioned, or to be free, with hazard of undoing his house by unthrifty posterity.

4. The last and greatest estate of land is fee-simple, and beyond this there is none. All the former, for years, lives, or entails, have further beyond them the estate of fee-simple; but fee-simple itself is the greatest, last, and uttermost degree of estates in land. Therefore he that maketh a lease for life to one, or a gift in tail, may appoint a remainder to another for life or in tail after that estate, or to a third in fee-simple; but after a fee-simple he can limit no other estate. And if a man do not dispose of the fee-simple by way of remainder when he maketh the gift in tail, or for lives, then the fee-simple resteth in himself as a reversion.

And the difference between a reversion and a remainder is this: the remainder is always a succeeding estate, appointed upon the gift of a precedent estate at the time when the precedent is appointed; but the reversion is the estate left in the giver, after a particular estate made by him for years, life, or in tail. Where the remainder is [not] [1] made with the particular estates, then it must be done by deed in writing, with livery and seisin, and cannot be by words. And if the giver will dispose of the reversion afterwards, that remaineth in himself, he is to do it in writing and not by word, and the tenant is to have notice of it, and to atturn it, which is to give his assent by word, or paying rent, or the like; and except the tenant will thus atturn, the party to whom the reversion is granted cannot have the reversion; neither can he compel him by any law to atturn, unless the grant of the reversion be by fine; and then he may, by writ provided for that purpose: and if he do not purchase that writ, yet by the fine the reversion shall pass, but the tenant shall pay no rent except he will, nor be punished for any waste in houses, woods, &c. [unless it be granted by bargain and sale by indenture enrolled [2]].

These fee-simple estates lie open to all perils of forfeitures, extents, incumbrances, sales, &c.

Lands are conveyed by these six means: 1. Feoffment; 2.

[1] I have introduced this negative without authority.
[2] Harl. MS. omits this, which seems a correction not well fitted into the text.

Fine; 3. Recovery; 4. Bargain and sale; 5. Covenant to stand seised; 6. A Will in writing.

1. A feoffment is, where, by deed or[1] without deed, lands are given to one and his heirs, and livery and seisin made. If a lesser estate than fee-simple be given, and livery of seisin made, it is not called a feoffment, but either a lease for life or a gift in tail, as above is mentioned.

2. A fine is a real agreement beginning thus, *Hæc est finalis concordia*, &c., and this is done before the King's judges in the Court of Common Pleas concerning land, that one man shall have it from another to him and his heirs, or to him for his life, or to him and the heirs or heirs male of his body, or for years certain; whereupon rent may be reserved, but no condition or covenants. This fine is a record of great credit; and upon this fine four proclamations are made openly in the Common Pleas; that is, every term one, for four terms together: and if any man, having right to the land, make not his claim within five years after these proclamations ended, he loseth his right for ever: except he be an infant, a woman covert, or beyond the seas, or mad; and then his right is saved, so that he claim it within five years after his full age, the husband's death, return from beyond the seas, or recovery of his wits, as the case falleth out. This fine is called a feoffment of record; because that it includeth all the feoffment doth, and worketh further of its own nature, and barreth entails peremptorily, whether the heir doth claim within five years or not, if he claim by him that levied the fine.

3. Recovery is where, for assurance of lands, the parties do agree that one shall begin an action real against the other, as though he had good right to the land; and the other shall not enter into defence against it, but allege that he bought the land of one I. S. who hath warranted it to him, and pray that I. S. may be called in to defend the title: which I. S. is one of the criers of the Common Pleas, and is called the common vouchee. This I. S. shall appear and make as if he would defend it, but shall pray a day to be assigned him by the court to bring in his matter of defence; which being granted him, at the day he maketh default; and thereupon the court is to give

[1] The printed text and Sloane MS. omit this, and add to the sentence "according to the form and effect of the deed."

judgment against him. Which judgment cannot be for him to lose the land, because he hath it not, but the party that he sold it to hath it, who vouched him to warrant it: therefore the demandant, who hath now no defence made against him, must have judgment to have the land against him that he sued, who is called the tenant, and the tenant is to have judgment against I. S. to recover in value so much land of his, whereas in truth he hath none, nor never will. And by this device, grounded upon strict principles of law, the first tenant loseth the land and hath nothing; but it is by his own agreement, for assurance to him that bought it.

This recovery barreth entails and all remainders and reversions that should take place after the entails: saving where the King is giver of the entail and keepeth the reversion in himself; there neither the heir, nor the remainder, nor reversion is barred by the recovery.

The reason why the heirs in tail, remainders, and reversions are thus barred is, because in strict law the recompense adjudged against the crier, that was vouched, is to go in succession of estate as the land lost should have done, and then it were not reason to allow the heir liberty to keep the land itself, and also to have recompense; therefore he loseth the land, and is to trust to the recompense.

This sleight was first invented when entails fell out to be so inconvenient as is before declared, so that men made no conscience to cut them off if they could find law for it. And now, by use, these recoveries are become common assurances against entails and against the remainders and reversions, and are the greatest security purchasers have for their money; for a fine will bar the heir in tail, and not the remainder, nor reversion, but a common recovery will bar them all.

Upon feoffments, fines, and recoveries, the estate of the land doth settle as the use and intent of the parties is declared, by word or writing, before the act was done; as for example, if they make a writing that one of them shall levy a fine, or make a feoffment, or suffer a recovery to the other, but the use and intent is, that one should hold it for his life, and after his death, a stranger to have it in tail, and then a third in fee-simple: in this case the land settleth in estate according to the use and intent declared: and that by reason of a statute made 27 H. VIII. conveying the land in possession to every one that

hath interest in the use or intent of the fine, feoffment, or recovery, according to the use and intent of the parties.

4. Upon this statute is also grounded the fourth and fifth of the six conveyances, *viz.* bargains and sales, and covenants to stand seised to uses; for this statute, wheresoever it findeth an use, conjoineth the possession to the use, and turneth the possession into that quality of estate, condition, rent, and the like, as the use hath.

The use is but the equity and honesty to hold the land *in conscientia boni viri.* As for example, if I and you agree that I shall give you money for your land, and you shall make me assurance of it; I pay you the money, but you have made me no assurance: here, although the estate of the land be still in you, yet the equity and honesty to have the land is with me; and this equity is called the use. Upon which I had no remedy, but in Chancery, until this statute, made 27 H. VIII.; and now, this statute conjoining and conveying the land to him that hath the use, I, for my money paid to you, have the land itself, without any other conveyance from you; and this is called a bargain and sale.

But the same parliament that made that statute did foresee that it would be mischievous that men's lands should so suddenly, upon the payment of a little money, be conveyed from them, peradventure in an alehouse or a tavern upon strainable advantages, [and][1] did gravely provide another act, in the same parliament, that the land, upon the payment of this money, should not pass away except there were a writing indented made between the parties, and the said writing also within six months enrolled in some of the courts at Westminster, or in the sessions rolls in the shire where the land lieth; [except it be in cities or corporate towns where they did use to enrol deeds, and there the statute extendeth not.][2]

5. The fifth conveyance[3] is a conveyance to stand seised to uses. It is in this sort; a man that hath wife and children, brothers or kinsfolks, may by writing under his hand and seal agree that for their or any of their preferment he will stand seised of his land to their uses, either for life, in tail, or fee-simple, as he shall see cause; upon which agreement in

[1] I have added this without authority.

[2] Omitted in Sloane MS.

[3] The MSS. have "The last conveyance of the [or, a] fine;" which, I suppose, indicates a reading "five," and that at first Wills were not treated of under this heading.

writing there ariseth an equity or honesty that the land should go according to this agreement, nature and reason requiring and allowing these provisions; which equity and honesty is the use. And the use being created in this sort, the statute of 27 H. VIII., beforementioned, conveyeth the estate of the land as the use is appointed.

And so this covenant to stand seised to uses is at this day, since the said statute, a conveyance of land. But this differeth from a bargain and sale, in that this needeth no enrolment as a bargain and sale doth, nor is tied to be in writing indented, as bargain and sale must: and if the party to whose use he agreeth to stand seised of the land be not wife, child, or cousin, or one that he meaneth to marry, then will no use rise, and so no conveyance: for although the law alloweth these weighty considerations of marriage and blood to raise uses, yet doth it not so of trifling considerations of acquaintance, schooling, service, and the like. But where a man maketh an estate of his land to others, by fine, feoffment, or recovery, he may then appoint the use to whom he listeth, without respect of kindred, marriage, money, or other things; for in that case, his own will and declaration guideth the equity of the estate. It is not so when he maketh no estate, but agreeth to stand seised, or when he taketh anything, as in the cases of bargain and sale and covenant to stand seised to uses.

6. The last of the six conveyances is a will in writing; which course of conveyance was first ordained by a statute made 32 H. VIII. before which statute no man might give land by will, except it lay in some borough town where there was a special custom that men might give their lands by will; as it is in London, and many others.

The not giving land by will was thought to be a defect at common law, that men in wars, or suddenly fallen sick, had not power to dispose their lands, except they could make a feoffment, or levy a fine, or suffer a recovery, which lack of time would not permit; and for men to do it by these means, when they could not undo it again, was hard: besides, even to the last hour of death, men's minds might alter upon further proof of their children or kindred, or increase of children, or debt, or desert of servants or friends.

For which causes it was reason that the law should permit him to reserve to the last instant the disposition of his lands,

and yet then also to give him a means to dispose it: which seeing it did not, men used this device:

They conveyed the full estates of their lands, in their good health, to friends in trust, called properly feoffees in trust; and then they would, by their wills, declare how these friends should dispose of the lands; and if those friends would not perform it, the course of the chancery was, to compel them by reason of trust. And this trust was called the use of the land; so as the feoffees had the land, and the party himself the use; which use was an equity to take the profits himself, and that the feoffees should make such estates as he should appoint them; and if he appointed none, then the use was to go to the heir as the estate itself of the land should have done. For the use was to the estate as a shadow following the body.

By this course of putting lands into use there were many inconveniences, as this use that grew first of a reasonable cause, to give men liberty to dispose their own, was turned to defraud many of their just and conscionable rights: as namely, a man that had cause to sue for his land knew not against whom to bring his action, nor who was owner of it; the wife was of her thirds defrauded; the husband of being tenant by the courtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for his debt; the poor tenant of his lease: for these rights and duties were given by the law from him that was owner of the land and none other, which was now the feoffee in trust; and so the old owner, which we call the feoffor or *cestui que use*, should take the profits and have power to dispose the land at his direction to the feoffee, and yet he was not such a tenant or so seised of the land as his wife could have dower, or the land be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be ward for it, or any duty of tenure fall to the lord by his death, or that he could make any lease of it.

Which frauds, by degrees of time as they increased, were remedied by divers statutes; as namely, by a statute of 11 H. VI. it was appointed that the action may be brought against him which taketh the profits, which was this *cestui que use*; by the statute of 1 R. III., leases and estates made by *cestui que use* are made good, and statutes by him acknowledged: by 4 H. VII. the heir of *cestui que use* is to be in ward: by 16 H.

VIII. the lord is to have relief upon the death of any *cestui que use.*

Which frauds multiplying nevertheless daily, in the end the parliament of 27 H. VIII., purposing to take away all those uses, and reduce the law to the ancient form of conveying land by public livery and seisin, fine, and recovery, did ordain that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and vested in him that had the use, for such term and time as he had the use.

By this statute of 27 H. VIII. the power of disposing land by will was clean taken away amongst those frauds; and so the statute did, *disperdere justum cum impio:* whereupon, 32 H. VIII., another statute was made, to give men power to give lands by will in this sort: first, it must be by will in writing: secondly, he must be seised of an estate in fee-simple; for tenant for another man's life, or tenant in tail, cannot give land by will by that statute: thirdly, he must be solely seised, and not jointly with another; and then being thus seised, for all the land he holdeth in socage tenure, he may give it by will; except he hold any piece of land *in capite* by knight-service of the King, and then, laying all together, he can give but two parts by will; and the third part of the whole, as well socage as *in capite*, must descend to his heir, to answer wardship, livery, and primer seisin to the crown.

And so if he hold lands by knight-service of a subject, he can of that land give but two parts by will; and the third the lord by wardship, and the heir by descent, is to hold.

And if a man that hath three acres holden *in capite* by knight-service do make a jointure to his wife of one, and convey another to any of his children, or to friends to take the profits to pay his debts, or legacies, or daughters' portions; then the third acre, or any part of it, he cannot give by will, but must suffer it to descend to the heir, and it must satisfy wardship.

Yet a man, having three acres, as before, may convey all to his wife or children by conveyance in his life time, as by feoffment, fine, recovery, bargain and sale, or covenant to stand seised to uses, and so disinherit the heir. But if his heir be within age when the father dieth, the King or other lord shall have that heir in ward, and shall have one of these three acres

during the wardship, and to sue livery and primer seisin: but at full age the heir shall have no part of it, but it shall go according to the conveyance made by the father.

It hath been doubted how the thirds shall be set forth: for that it is the use that all lands which the father leaveth to descend to the heir, being fee-simple or in tail, must be part of the third; and if it be a full third, then the King, nor lord, nor heir, can intermeddle with any of the rest; if it be not a full third yet they must take so much as it is, and have a supply out of the rest. This supply is to be taken thus: if it be the King's ward, then by a commission out of the court of wards; whereupon a jury by oath must set out so much as will make up the third, except the officers of the court of wards and the parties can otherwise agree: if there be no wardship due to the King, then the other lord is to have this supply by a commission out of the Chancery, and jury thereupon.

But in all those cases the statute doth give power to him that maketh the will to set forth and appoint of himself which lands shall go for thirds, and neither King nor lord can refuse it. And if it be not enough, yet they must take that in part, and only have a supply, in manner as before is mentioned, out of the rest.

Property in goods and chattels is gained in ten ways: 1. by gift; 2. by sale; 3. by stealing; 4. by waiving; 5. by straying; 6. by shipwreck; 7. by forfeiture; 8. by executorship; 9. by administration; 10. by legacy.

1. By gift, property of goods may pass by words or writing. But if there be a general deed of gift made of all his goods, this is suspicious to be done upon some fraud, to deceive the creditors. And if a man that is in debt make a deed of gift to prevent the taking them in execution for his debt, this deed of gift is void as against those to whom he stood indebted; but as against himself, his own executors, or administrators, or any man to whom he shall afterwards sell or convey them, the deed is good.

2. By sale, any man may convey his own goods to another. And although he fear executions for debts, yet he may sell them outright for money at any time before the execution served, so there be no reservation of trust between the parties that, paying the money, he shall have the goods again; for that trust, in

such case, doth plainly prove a fraud to prevent his creditors from taking the goods in execution.

3. If a man steal my goods or chattels, or take from me in jest, or borrow them of me, or as trespasser and not felon take them away, and carry them to a market or fair, and there sell them; this sale doth bar me of the property of my goods: saving that, if it be a horse, he must be ridden two hours in the open market or fair, between ten and five of the clock, and tolled for in the toll book, and the seller must bring one to avouch the sale known to the toll-book keeper, or else the sale bindeth me not. And for any other goods, where the sale in market or fair shall bar the true owner (being not the seller) of his property, it must be sale in a market or fair where usually things of that nature are sold. As for example; if a man steal a horse, and sell him in Smithfield, the true owner is barred by this sale; but if he sell the horse in Cheapside, or Newgate market, or Westminster market, the true owner is not barred, because these markets are usual for herbs[1], flesh, fish, &c. and not for horses. So, whereas by the custom of London every shop there is a market all the days of the week, saving Sundays and holidays; yet if a piece of plate or jewel that is lost, or chain of gold or pearl that is stolen or borrowed, be sold in a draper's or scrivener's shop, or any other's but a goldsmith, this sale barreth not the true owner; *et sic in similibus.*

Yet by stealing of goods alone the thief getteth no such property but that the owner may seize them again wheresoever he findeth them, except they have been sold in fair or market after they were stolen, and that *bonâ fide* without fraud.

But if the thief be condemned of the felony, or outlawed for the same, or outlawed in any personal action, or any way commit a forfeiture of goods to the crown, then the true owner is without remedy for those goods.

Nevertheless, if freshly after they were stolen the true owner make fresh pursuit after the thief and goods, and take the goods with the thief, he may take his goods again: and if he make no fresh pursuit, yet if he prosecute the felon so far as justice requireth, that is, if he get him indicted, arraigned, and found guilty, though he be not hanged nor have judgment of death, or have him outlawed upon the indictment, or to have judgment of death; in all these cases he shall have his goods

[1] So in the two MSS., omitted in the printed text.

again by a writ of restitution to the party in whose custody they be.

4. By waiving, the property of goods is thus gotten. A thief having stolen goods, and being pursued, flying away and leaving the goods, this leaving is called waiving; and the property is in the King, except the lord of the manor have right to them by custom or charter.

But if the felon be indicted and judged, or found guilty, or outlawed at the suit of the owner of these goods, he shall have restitution of the goods as before.

5. By straying, property in live cattle is thus gotten. When they come into other men's grounds, straying away from the owners, then the party or lord into whose grounds or manor they come causeth them to be seized, and a withe to be put about their necks, and to be cried in the[1] markets adjoining, showing the marks of the cattle; which done, if the true owner claim them not within a year and a day, then the property of them is in the lord of the manor whereunto they did stray if he have estrays by custom or charter, else in the King.

6. By wreck, property is thus gotten. When a ship laden is cast away upon the coast, so that no living creature that was in it when it began to sink escapeth to the land with life, then all those goods are said to be wrecked; and they belong to the crown if they be found, except the lord of the soil adjoining can entitle himself by custom, (which we call *prescription*[2],) or the King's charter.

7. By forfeiture, goods and chattels are thus gotten. If the owner be outlawed; if he be indicted of felony, or treason, and either confess it or else be found guilty of it, or refuse to be tried by peers or jury, or be attainted by judgment; or fly for felony, although he be not guilty; or suffer the exigent to go forth against him, although he be not outlawed; or if he go beyond seas without license; all the goods he hath at the judgment be forfeited to the crown; except some lord by charter can claim them. For in those cases prescription will not serve, except it be so ancient that it hath had allowance before the justices in eyre in their circuits, or in the King's Bench, in ancient time.

[1] So Harl. MS. The printed text has "three markets," and the Sloane MS. "three market days." *Two* proclamations in *two* several markets are required.

[2] So Sloane MS. The other authorities omit the clause.

8. By executorship goods are gotten thus. When a man that is possessed of goods maketh his last will and testament in writing or by word, and maketh one or more executors thereof, these executors have by this will and the death of the party the property of all his goods, chattels, and leases for years, wardships of lands and body, extents of statutes, judgments, and recognisances, and all debts and specialities, as bills, bonds, and covenants of debt, and all conditions upon sale of leases for years, wardships, or extents, and all right concerning those things.

These executors may meddle with the goods and dispose them before they prove the will; but they cannot bring an action for any debt or duty belonging to their testator before they have proved the will.

The proving of the will is thus. They are to exhibit the will in the Bishop's court, and bring the witnesses thither, and there they are to be sworn; and the Bishop's officers do keep the original will, and certify the copy thereof in parchment under the Bishop's seal of office; which parchment, so sealed, is called the will proved.

9. By letters of administration property is thus gotten. When a man possessed of goods dieth without any will, there such things as executors should have had if he had made a will were by the ancient law to come to the bishop of the diocese, to dispose for the good of his soul that is dead, he first paying his funeral and debts, and giving the rest *in pios usus*. This is now altered by statute laws; so as the bishops are to grant letters of administration of the goods at this day to the wife if she require it, or to children, or next of kin; if they refuse it, as often they do because the debts are greater than the estate will bear, then some creditor or other will take it as the bishop's officers shall think meet.

It groweth often in question what bishop should have the right of proving wills, and granting administration of goods. In which controversy the rule is thus: that if the party dead had at his death known goods of some reasonable value, called *bona notabilia*, in divers dioceses, then the Archbishop of the province where he died is to have the probate of his will, or to grant the administration of his goods, as the case falleth out; otherwise, the bishop of the diocese where he died is to do it.

If there be but one executor made, yet he may refuse the

executorship, coming before the bishop, so he have not meddled before with any of the goods, or with receiving debts, or paying legacies.

And if there be more executors than one, so many as list may refuse; and if any one take it upon him, the rest that once did refuse may take it upon them when they will. And no executor shall be further charged with debts or legacies than the value of the goods come to his hands, so he foresee that he pay debts of record first, namely, debts to the King, then upon judgments, statutes, recognizances; and then debts by bond and bill sealed, or for rent unpaid, or servants' wages, or payment to head workmen; and, lastly, shop-books, and contracts by word. For if an executor or administrator pay debts to others before debts to the King, or pay debts by bond before those due by record, or pay debts by shop-books or contracts before those by bond, arrearages of rent, and servants' or workmen's wages, he shall pay the same again to those others in the said degrees.

But yet the law giveth them choice, that where divers have debts due in equal degree of record or specialty, he may pay which of them he will before any suit brought against him; but if suit be brought he must pay him that first getteth judgment against him.

Any one executor may convey the goods, or release debts, without his companion; and any one by himself may do as much as all together; but one man's releasing of debts or selling goods shall not charge the other to pay so much of their goods, if there be not enough besides to pay debts; but it shall charge the party himself that did so release or convey. But it is not so of administrators, because they have but one authority by the Bishop given them over the goods, which authority, being given to many, is to be executed by all of them joining together.

And if an executor die making his executor, this second executor is to be executor to the first testator. But if an executor die intestate, then his administrator shall not be executor or administrator to the first; but in that case the bishop, whom we call the ordinary, is to commit the administration of the first testator's goods to his wife, or next of kin, as if he had died intestate; always provided, that that which the executor did in his lifetime is to be allowed for good. And so if an adminis-

trator die, and make an executor, this executor of the administrator shall not be executor to the first intestate; but the ordinary must new commit the administration of the goods of the first intestate again.

If the executor or administrator do pay debts or funerals or legacies of his own money, he may retain so much of the goods in kind of the testator or intestate, and shall have property of it in kind.

10. Property by legacy is where a man maketh a will and executors, and giveth legacies. He to whom the legacy is given must have the assent of the executors, or one of them, to have his legacy; and the property of that lease, or other goods bequeathed unto him, is said to be in him; but he may not enter nor take his legacy without the assent of the executors, or one of them; because the executor is charged to pay debts before legacies; and if he assent to legacies, he shall pay the value thereof of his own goods if there be not otherwise sufficient to pay the debts.

But this is to understood of debts of record to the King, or by bill or bond sealed, or arrearages of rent, or servants' or workmen's wages; and not debts by shop-books, or bills unsealed, or contract by word; for before them legacies are to be paid.

And if the executors doubt that they shall not have enough to pay every legacy, they may pay which they list first; but they may not sell a special legacy of a lease or goods in kind, to pay a money-legacy. But they may sell any legacy which they will to pay debts, if they have not enough besides.

If a man make a will, and make no executors, [or if the executors refuse,][1] the ordinary is to commit administration *cum testamento annexo,* and take bonds of the administrator to perform the will; and he is to do it in such sort as the executor should have done if he had been named.

[1] Omitted in MSS. The whole paragraph would come better under the titles of *Executors* and *Administrators*; which, again, are themselves confused.

DISCOURSE

UPON

THE COMMISSION OF BRIDEWELL.

PREFACE.

THIS was first published by Mr. Martin in his Report on Bridewell Hospital, 32nd *Rep. of Charity Commission*, part 6. p. 576.: from Harl. MS. 1323. He was kind enough to point it out to me; but Mr. Spedding had already made a copy of the MS., not being aware of its having been already printed.

There is another copy in the Cambridge Library, which is anonymous; and I am not aware of any circumstances otherwise tending to authenticate it. It appears however to be a legal opinion, to which a name must from the first have been attached, and I see no intrinsic reason for doubting its being Bacon's, of a time when he was a young man.

It speaks of "Her Majesty that now is," and was therefore written in Elizabeth's time, and a reference to Mr. Martin's Report will lead us to fix the date without much hesitation as of some time before Oct. 11th 1587. An order of Common Council, now at Guildhall, dated Augst. 4th 1579, professed to give the Governor of the Hospital very arbitrary powers over the rogues and vagabonds of London. A modified copy of this order, in print, is at Bridewell, bearing date Octr. 11th 1587. Mr. Martin thinks the date may be a mistake; and as he does not set out the differences between the two, I can form no opinion whether this is really a new order: but on this same day another order was made with the preface, "This day certain orders and ordinances lately devised by the committees who were appointed to devise means for the banishment of rogues &c., were here in open court read, and by the same ratified and confirmed;" and the ordinances which follow are of a much less stringent character. Nothing seems more probable than that the question had been in the meantime discussed,

whether it was quite safe to rely on the charter, and to ground on it such very strong measures as were at first contemplated.

If the paper be really Bacon's, it appears to me to be very interesting, as it ascertains in the most authentic way the constitutional opinions with which he entered into life. In particular, it is curious to see the jurisdiction of the Welsh Council rested on a purely parliamentary basis. I see no sufficient reason for thinking he ever altered this opinion, though he was of counsel to those who maintained the contrary one.[1]

[1] See Preface to the *Argument for the Council of the Marches.*

A BRIEF DISCOURSE

UPON

THE COMMISSION OF BRIDEWELL,

WRITTEN BY

SIR FRANCIS BACON, KNIGHT.[1]

INTER magnalia regni, amongst the greatest and most haughty things of this kingdom, as it is affirmed in the 19th year of Henry the 6th, 63,[2] *la ley est la plus haute enheritance que le Roy ad*, &c. that is, the Law is the most highest inheritance that the King hath; for by the law both the King and all his subjects are ruled and directed, &c.

The maxims and rules by which the King is directed are the ancient Maxims, Customs, and Statutes, of this land.

The Maxims are the foundations of the Law, and the full and perfect conclusions of reason.

The Customs of the Realm are properly such things as through much, often, and long usage either of simplicity or of ignorance getting once an entry, are entered and hardened by succession, and after be defended as firm and stable laws.

The Statutes of the realm are the resolute decrees and absolute judgments of the Parliament, established by the King with the common consent of three Estates, who do represent the whole and entire body of the realm of England.

To the purpose of this discourse the law is, if any Charter be granted by a King the which is repugnant to the Maxims,

[1] The Cambridge MS. has merely "A Discourse upon the Commission of Bridewell." I do not suppose either title is the original one.

[2] The page of the Year Book is never given throughout the MS. When I have succeeded in lighting upon it, I have added it to the text.

Customs, or Statutes of the Realm; then is the Charter void. And it is either by *quo warranto* or by *scire facias* (as learned men have left precedents) to be repealed. Anno 19: Ed. 3.

That a King's grant either repugnant to law, custom, or statute is not good nor pleadable in the law, see what precedents thereof have been left by our wise forefathers. It is set down in the 14th Henry the 6th 11, 12. that King Henry the 2d had by his Charter granted to the Prior and Monks of St. Bartholomews in London, that the Prior and his Monks should be as free in their Church as the King was in his Crown; yet by this grant was the Prior and his Monks deemed and taken to be but as subjects, and the aforesaid grant in that respect to be void: for by the law the King may not any more disable himself of his regal superiority over his subjects, than his subject can renounce or avoid his subjection against or towards his King or superior. You know Story[1] would have renounced his loyalty and subjection to the Crown of England and would have adopted himself to have been a subject to King Philip. Answer was made by the Court, for that by the laws of this Realm neither may the King release or relinquish the subjection of his subjects, neither may the subject revolt in his allegiance from the superiority of his Prince.

There are two notable precedents in the time of King Edward the 3d, the which although they take place in some one respect, yet were they not adjudged of according to the mind of the King being the grantor. That is, the King granted unto the Lord William Montague the Isle of Wight, and that he should be crowned King of the same. And he also granted unto the Earl of Darby the Isle of Man and that he should be crowned King of the same. Yet these two personages notwithstanding the said grants were subjects; and their islands were under the dominion and subjection of the King; and in that respect were the grants void.

It was spoken in the 8th of Henry 4th 9., *Quod potestas principis non est inclusa legibus:* that is, a prince's power is not bounded by rules or limits of the law. Howsoever that sentence is, see the law agreed to the contrary, the 37th[2] of Henry 6th 26, 27. whereas it is agreed for law that it is

[1] Dyer, 300.

[2] The MSS. have 31 Hen. 6. but a reference to 37 Hen. 6th is annexed, which is clearly the true one. S. C. Br Prerog. 103.

not in the King's power to grant by his Charter that a man seised of lands in fee simple may devise by his last will and testament the same lands to another, or that the youngest son by the custom of Borough English shall not inherit; or that lands being frank fee shall be of the nature of ancient demesne; or that in a new incorporated Town an assise of fresh force should be used, or that they shall have toll travers or through toll or such like, &c. 49 Ass. 4, 8.

See also a notable case agreed for law in the 6th of Henry 7th 4. where the justices do affirm the law to be that Rape is made felony by statute, that the same by the law is not enquirable but before justices that have authority to hear and determine of the same: in this case the King cannot by his charter make the same offence to be enquired of in a Lawe day, nor the King cannot grant that a Leet shall be of any other nature than it is by course of the Common Law. So that thereby it appeareth that the King may not either alter the nature of the law, the form of a court, or the manner and order of pleading.

And in the 8th of Henry 6th 19. it is agreed for law that the King may not grant to J. S. that J. S. may be judge in his own proper cause, nor that J. S. shall [not][1] be sued by any action at the Common Law by any other person, nor that J. S. shall have a market, a fair, or a free warren in another man's soil.

And in the long Record[2], by Hill the reverend judge it is said for law, that whereas the King hath a Prerogative that he shall have the wardship of the body of his tenants although he hold of the King by posteriority, yet if the King grant his signory unto another with like prerogative notwithstanding any posteriority, this prerogative shall not pass, for, saith the book, the King by his charter cannot change the law. The same law is, that the King cannot grant unto another the prerogative of *nullum tempus occurrit Regi*, nor that a descent shall not take away an entry, nor that a collateral warranty shall not bind, nor that *possessio fratris* shall not take place, nor that the wife shall not be endowed of her husband's lands, nor that inheritance shall lineally ascend, nor that any subject shall be under protection from arrests and suits and such like, &c.

Yet do not we see daily in experience that whatsoever can be

[1] I have added this word conjecturally. [2] 14 Hen. 4. 9.

procured under the great seal of England is taken *quasi sanctum;* and although it be merely against the laws, customs, and statutes of this realm, yet it is defended in such sort, that some have been called rebellious for not allowing such void and unlawful grants?

And an infinite number of such like precedents I could set down to maintain the aforesaid argument, but these few examples shall serve for this time, &c.

But now have we to see if the said Charter granted to the city, concerning the authority of the Governor of Bridewell, stand with the laws, customs, and statutes of this Realm, or not: the effect of which charter in one place is that the Governors have authority to search, enquire, and seek out idle ruffians, tavern haunters, vagabonds, beggars, and all persons of evil name and fame whatsoever they be, men or women, and then to apprehend and the same to commit to Bridewell, or by any other way or means to punish or correct them as shall seem good to their discretions.

Here we see what the words of the said Charter are. Now are we to consider what the words of the Law be.

See Magna Charta of the liberties of England, cap. 29. No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any other way destroyed, nor we shall not pass upon him nor condemn him but by lawful judgment of men of his degree, or the law of the land.

Now if we do compare the said Charter of Bridewell with the great Charter of England both in matter, sense, and meaning, you shall find them merely repugnant.

In the said great Charter of England, in the last chapter, amongst other things the King granteth for him and his heirs, that neither he nor his heirs shall procure or do anything whereby the liberties in the said Charter contained shall be infringed or broken; and if anything be procured or done by any person contrary to the premises it shall be had of no force or effect. Here must you note also that the said great Charter of England is not only confirmed by the statute of Marlebridge, cap 5., but also by many other statutes made in the time of King Edward 3rd, King Richard 2nd, Henry 4th, Henry 5th, and Henry 6th, amongst sundry of which confirmations I note one above the rest, the which is Anno 42

Ed. 3. chap. 1. The words are these. It is assented and accorded that the great Charter of England and the Charter of the Forests shall be kept in all points, and if any statute be made to the contrary that shall be holden for none.

Hitherto ye see it very plainly that neither procurement nor act done either by the King or any other person, or any act of Parliament, or other thing may in any ways alter or change any one point contained in the said great Charter of England. But if you will note the words, sense, matter, and meaning of the said Charter of Bridewell, ye shall find it all merely repugnant to the said great Charter of England. I do note one special statute made in the said 42nd of Edward the 3rd, the which if it be well compared with the said Charter of Bridewell it will make an end of this contention. The words are these. Item, at the request of the Commons by the petition put forth in this Parliament, to eschew the mischief and damage done to divers of the commons by false accusers which often times have made their accusements more for vengeance and singular profit than for the profit of the King and his people, of which accused persons some have been taken and caused to come &c. against the law; it is assented and accorded for the government of the Commons that no man be put to answer without presentment before Justices, or thing[1] of Record, [or] by due process, as by writ original, according to the old law of the land; and if anything from henceforth be done to the contrary it shall be void in the law and holden for error. As I said before, so say I still, if this statute be in force, as I am sure it is, then is the law clear that the proceedings in Bridewell upon the accusation of whores taken by the Governors of Bridewell aforesaid are not sufficient to call any man to answer by any warrant by them made, without indictment or other matter of Record according to the old law of the land.

Such like commissions as this of Bridewell is were granted in the time of K. Edward the Third by especial procurement to enquire of special articles, the which commissions did make their enquiries in secret places &c. It was therefore enacted Anno 42° Ed. 3. cap. 4. that henceforth in all enquiries within the realm Commissions should be made to some Justices of the one Bench or other, or Justices of Assize or Justices

[1] In the MS. it appears to be "of the King," obviously by a clerical error.

of the Peace with other of the most worthy of the Country. By this Statute we may learn that Commissions of Enquiries ought to sit in open Courts, and not in any close or secret place, and that their enquiries ought to be by juries and by no discretion or examination. If you look upon the Statute of Anno 1° Hen. 8. cap. 8. you shall there perceive the very cause why Empson and Sheffield and others were quite overthrown, the which was, as by the Indictment especially appeareth, for executing Commissions against due course of the common law, and in that they did not proceed in justice according to the liberties of the great Charter or England, and of other laws and statutes provided for the due executing of Justice.

There was a Commission granted forth in the beginning of the reign of her Majesty that now is, unto Sir Ambrose Cape, Sir Richard Sackville, and others, for the examination of felons and of other lewd prisoners. It so fell out that many men of good calling were impeached by the accusations of felons. Some great men, and Judges also, entered into the validity of the Commission. It was thought that the Commission was against the law and therefore did the Commissioners give over the Commission, as all men know.

And whereas the examination is by the Commission referred to the wisdom and discretion of the Governors of Bridewell, as touching this point I find that the examination of robberies done by sanctuary men was appointed unto the discretion of the Council or unto four Justices of the Peace; but this was not by commission or by grant, but by act of Parliament made Anno 22° Hen. 8. cap. 14. The Justices of both the Benches have used to examine the abilities and disabilities of attornies, and by their discretion to place or remove the same upon their misdemeanors, without any solemnity of trial at the Common Law; and that is and hath been done by the Treasurer and Barons of the Exchequer touching the attorneys: but if you search the cause you shall find the same to be done by authority of Parliament, Anno 4° of Hen. 4. cap. 18.

And whereas sundry men are arrested by *latitat, capias*, attachments, and such like processes whereby their corporal presence is required, yet upon infirmities and other maladies the Justices, having examined the matter, may by their discretions admit them to make attornies; but note you that all this is done by authority of Parliament in Anno 7° H. 46. cap. 13.

The Commission of Bankrupts giveth power to the Commissioners to take order by their discretions both with the body and goods of the bankrupt and to set the bankrupt out of his house, and him to imprison; and all this is referred to the discretion of the Commissioners: but this is by authority of Parliament, Anno 13 Eliz. cap. 7.

The punishment and examination of such as counterfeit letters or privy tokens is referred to the discretions of the Justices of peace in every county: but this is by Parliament, Anno 33 Hen. 8th, cap. 1.

The examination of Riots, Routs, and such like misdemeanors in the Star Chamber is referred to the discretion of the Judges of the Court: but this is by Parliament, Anno 3 Hen. 7. cap. 1. et 21 Hen. 8. cap. 20.

The examination of unlawful hunting in the King's warrens &c. is referred to the discretion of the Justices of peace, and if the offender deny his hunting, then it is felony. This also is by Parliament, Anno 1° Hen. 7. cap. 7.

The rate, taxation, and punishment of servants labourers and of their wages is referred to the discretion of the Justices of peace in every county. And this also is by Parliament, Anno 5° Eliz. cap. 4.

The examination of Rogues and vagabonds, with the forms of their punishment, is referred to the Justices, but by Parliament.

The determination of all causes in Wales is referred to be ended by the King's Council there established by their wisdoms and discretions: but yet this is by Parliament.

The grant of the pluralities, *tot quot* qualifications, dispensations, licenses, and tolerations, is referred to the discretion of the Archbishop of Canterbury: but this is by Parliament.

The dealings and examinations of High Commissioners are authorised altogether by Parliament.

And to be short, ye shall find in the great volume of the Statutes near the number of forty Acts of Parliament that do refer the examination or punishment of offenders to the wisdom and discretion of the Justices; whereupon I note that if the King by prerogative might have done all things by Commission or by Charter, that it had been vain to have made so many laws in Parliament for the same, &c.

And to make the law more manifest in this question, Anno

42 Ed. 3. lib. Assis. N° 5. a commission was sent out of the Chancery to one I. S. and others, to arrest the body and goods of A. B. and him to imprison. And the Justices gave judgment that this Commission was directly against the law, to take any man's body without indictment; and therefore they took the Commission from the Commissioners to the intent to deliver the same to the King's Council, *quod nota.*

And I do find also in the 24th of Ed. 3. this precedent; that a Commission was granted unto certain persons for to indict all those that were notoriously slandered for any felonies, trespasses, or for any other misdemeanors, yea although they were indicted for the same; and it was adjudged that this commission was directly against the law.

And [thus][1] I do conclude upon the whole matter that the Commission of Bridewell would be well considered of by the learned Counsell of the city; for I do not think the contrary but that there be learned[2] that by their great knowledge in the law are well able either in a *quo warranto*, or any other action brought to defend the same, &c.

[1] "These" in MS.

[2] So in both MSS. I take the general meaning to be, that though he has given reasons for doubting the validity of the Charter, yet it may be that the City counsel may be able to defend it.

FINIS.

ARGUMENTS OF LAW.

PREFACE.

THE Dedication and first four of these Arguments were printed by Blackbourne in 1730, from Sloane MS. 4263., a MS. largely corrected by Bacon himself. The Dedication, as first copied in the uncorrected draft, must have been written while Coke was Chief Justice of the Common Pleas, *i. e.* before Mich. Term, 1613; but, if I am right in identifying the *Case of Impeachment of Waste* with Lewis Bowles' Case, the transcript must have been made after Easter Term, 1615. Bacon's interlineations fix his revision as of the time when he was a Privy Councillor and Coke Chief Justice of the King's Bench, *i. e.* 1616, and before November of that year.

These four Arguments are given in the order of the MS. The others follow in their own chronological order.

THE

ARGUMENTS OF LAW

OF

SIR FRANCIS BACON, KNIGHT,

THE KING'S SOLICITOR GENERAL,

IN CERTAIN GREAT AND DIFFICULT CASES.

LIBRARY OF THE UNIVERSITY OF CALIFORNIA

TO

MY LOVING FRIENDS AND FELLOWS,

THE

READERS, ANCIENTS, UTTER-BARRISTERS, AND STUDENTS OF GRAY'S INN.

I DO not hold the law of England in so mean an account, but that which other laws are held worthy of should be due likewise to our laws, as no less worthy for our state. Therefore, when I found that, not only in the ancient times, but now at this day in France, Italy, and other nations, the speeches, and as they term them pleadings, which have been made in judicial cases, where the cases were weighty and famous, have been set down by those that made them, and published, so that not only a Cicero, or a Demosthenes, or an Æschines hath set forth his orations, as well in the kind judicial as deliberative, but a Marrian[1] and a Pavier have done the like by their pleadings, I know no reason why the same should not be brought in use by the professors of our law for their arguments in principal cases. And this I think the more necessary, because the compendious form of reporting resolutions with the substance of the reasons, lately used by Sir Edward Coke, Lord Chief Justice of the King's Bench[2], doth not delineate or trace out to the young practisers of law a method and form of argument for them to imitate.

It is true, I could have wished some abler person had begun; but it is a kind of order sometimes to begin with the meanest. Nevertheless, thus much I may say with modesty,

[1] No doubt the *Plaidoyers de Marion* are meant, though the earliest edition mentioned in the *Bibliothèque de Droit*, by Camus and Dupin, is of 1625. I have not found the name of Pavier.

[2] In the first draft, "Common Pleas": and then follows "as it is far best for the science of Law itself, so nevertheless it doth not," &c.

that these arguments which I have set forth (most of them) are upon subjects not vulgar, and therewithal, in regard of the commixture that the course of my life hath made of law with other studies, they may have the more variety, and perhaps the more depth of reason: for the reasons of municipal laws severed from the grounds of nature, manners, and policy are like wall flowers, which, though they grow high upon the crests of states, yet they have no deep roots. Besides, in all public service I ever valued my reputation more than my pains, and therefore, in weighty causes I always used extraordinary diligence. In all which respects I persuade myself the reading of them will not be unprofitable.

This work I knew not to whom to dedicate rather than to the Society of GRAY'S INN, the place whence my father was called to the highest place of justice, and where myself have lived and had my proceeding so far as, by his Majesty's rare if not singular grace, to be of both his counsels, and therefore few men so bound to their societies by obligation both ancestral and personal, as I am to yours: which I would gladly acknowledge, not only in having your name joined with mine own in a book, but in any other good office and effect which the active part of my life and place may enable me unto, toward the Society, or any of you in particular. And so I bid you right heartily farewell.

Your assured loving Friend and Fellow,

F. B.

I. The Argument before the Judges in the Exchequer Chamber, touching the Clause of Impeachment of Waste.

II. The Argument in Lowe's Case, touching Tenures, in the King's Bench.

III. The Argument of the Lady Stanhope's Case, touching the Clause of Revocation of Uses, in the King's Bench.

IV. The several Arguments proving the Jurisdiction of the Council of the Marches over the Four English Shires, before all the Judges at Serjeants' Inn.

THE

CASE OF IMPEACHMENT OF WASTE.

THE case needs neither repeating nor opening.[1] The point in substance is but one; familiar to be put, but difficult to be resolved; that is, whether upon a lease without impeachment of waste, the property of the timber trees after severance be not in him that is owner of the inheritance?

The case is of great weight, and the question of great difficulty: weighty it must needs be, for that it doth concern, or may concern, all the lands in England; and difficult it must be, because this question sails *in confluentiis aquarum;* in the meeting or strife of two great tides. For there is a strong current of practice and opinion on the one side, and there is a more strong current (as I conceive) of authorities both ancient and late on the other side. And, therefore according to the reverend custom of the realm it is brought now to this assembly. And it is high time the question received an end, the law a rule, and men's conveyances a direction.

This doubt ariseth and resteth upon two things to be considered: first, to consider of the interest and property of a timber tree, to whom it belongs; and secondly, to consider of the construction and operation of these words or clause, *absque impetitione vasti:* for within these two branches will aptly fall whatsoever can be pertinently spoken in this question, without obscuring the question by any other curious division.

For the first of these considerations, which is the interest or

[1] Bacon makes a note in the MS.: "The case to be had from Mr. Heath or Serj. Finch"; which gives a further indication of time, for Finch was not called to the coif till Easter, 1615. Dugdale, *Origines Juridiciales.* The case is obviously *Lewis Bowles' case* 11 Co. 79. S. C. 1 Roll. 177. It was decided in the K. B. against the plaintiff, who thereupon talked of bringing error: apparently he did so and had Bacon for his counsel. We may assume he was unsuccessful, as the law remained undisturbed.

property of a timber tree, I will maintain and prove to your lordships three things.

First, that a timber tree, while it groweth, is merely parcel of the inheritance, as well as the soil itself. And secondly I will prove that when either nature or accident or the hand of man hath made it transitory, and cut it off from the earth, it cannot change owner, but the property of it goeth where the inheritance was before. And thus much by the rules of the common law.

And thirdly, I will show that the statute of Gloucester doth rather corroborate and confirm the property in the lessor than alter it, or transfer it to the lessee.

And for the second consideration, which is the force of that clause, *absque impetitione vasti*, I will also uphold and make good three other assertions.

First that if that clause should be taken in the sense which the other side would force upon it, that it were a clause repugnant to the state and void.

Secondly, that the sense which we conceive and give is natural in respect of the words, and, for the matter, agreeable to reason and the rules of law.

And lastly that if the interpretation seem ambiguous and doubtful, yet the very mischief itself, and consideration of the commonwealth, ought rather to incline your lordships' judgment to our construction.

My first assertion therefore is, that a timber tree is a solid parcel of the inheritance; which may seem a point admitted, and not worth the labouring. But there is such a chain in this case, as that which seemeth most plain, if it is sharply looked into, doth invincibly draw on that which is most doubtful. For if the tree be parcel of the inheritance unsevered, inhering in the reversion, severance will not alien it; nor the clause will not divest it.

To open, therefore, the nature of an inheritance: Sense teacheth there be of the soil and earth parts that are raised and eminent, as timber trees, rocks, houses. There be parts that are sunk and depressed, as mines which are called by some *arbores subterraneæ*,—because that as trees have great branches, and smaller boughs, and twigs, so have they in their region greater and smaller veins: so if we had in England beds of porcelain, such as they have in China,—which porcelain is a

kind of a plaster buried in the earth and by length of time congealed and glazed into that fine substance; this were as an artificial mine, and no doubt part of the inheritance. Then are there the ordinary parts, which make the mass of the earth, as stone, gravel, loam, clay, and the like.

Now as I make all these much in one degree, so there is none of them, not timber trees, not quarries, not minerals or fossils, but hath a double nature; inheritable and real while it is contained with the mass of the earth, and transitory and personal when it is once severed. For even gold and precious stone, which is more durable out of earth than any tree is upon the earth; yet the law doth not hold of that dignity as to be matter of inheritance, if it be once severed. And this is not because it becometh moveable, for there be moveable inheritances, as villains in gross, and dignities which are judged hereditaments; but because by their severance they lose their nature of perpetuity, which is of the essence of an inheritance.

Nevil's case proving there are inheritances which are not local. 7 Co. 121.

And herein I do not a little admire the wisdom of the laws of England, and the consent which they have with the wisdom of philosophy, and nature itself. For it is a maxim of philosophy, that *in regione elementari nihil est æternum, nisi per propagationem speciei, aut per successionem partium.* And it is most evident that the elements themselves, and their products, have a perpetuity not *in individuo*, but by supply and succession of parts. For example, the vestal fire, that was nourished by the virgins at Rome was not the same fire still, but was in perpetual waste, and in perpetual renovation. So it is of the sea, and waters; it is not the same water individually, for that exhales by the sun, and is fed again by showers. And so of the earth itself, and mines, quarries, and whatsoever it containeth, they are corruptible individually, and maintained only by succession of parts; and that lasteth no longer than they continue fixed to the main and mother globe of the earth, and is destroyed by their separation.

The consent of the law with philosophy in distinguishing between perpetual and transitory.

According to this I find the wisdom of the law by imitation of the course of nature, to judge of inheritances and things transitory. For it alloweth no portions of the earth, no stone, no gold, no mineral, no tree, no mould, to be longer inheritance than they adhere to the mass, and so are capable of supply in their parts; for by their continuance of body stands their continuance of time.

Neither is this matter of discourse, except the deep and profound reasons of law which ought chiefly to be searched shall be accounted discourse, as the slighter sort of wits (*scioli*) may esteem them.

And therefore now that we have opened the nature of inheritable and transitory; let us see, upon a division of estates and before severance, what kind of interest the law allotteth to the owner of inheritance, and what to the particular tenant; for they be competitors in this case.

First, in general the law doth assign to the lessor those parts of the soil conjoined which have obtained the reputation to be durable, and of continuance, and such as being destroyed are not but by long time renewed; and to the termor it assigneth such interests as are tender, and feeble against the force of time, but have an annual, or seasonable return or revenue. And herein it consents again with the wisdom of the civil law; for our inheritance and particular estate is in effect their[1] *dominium* and *usus-fructus;* for so it was conceived upon the ancient statute of depopulations, 4° Hen. VII. which was penned, *that the owner of the land should re-edify the houses of husbandry*, that the word *owner* (which answereth to *dominus*) was, he that had the immediate inheritance, and so ran the later statutes.

The consent of the law with the civil law in the distinguishing between inheritance and particular estates, which hath relation to their division of *dominium* and *usus-fructus*.

Owner in the stat. 4 H. 7.

Let us see therefore what judgment the law maketh of a timber tree; and whether the law doth not place it within the lot of him that hath the inheritance, as parcel thereof.

The writ of waste supposeth the felling timber to be *ad exhæredationem*.

First, it appeareth by the register out of the words of the writ of waste, that the waste is laid to be *ad exhæredationem*, which presupposeth *hæreditatem:* for there cannot be a disinherison by the cutting down of the tree except there was an inheritance in the tree; *quia privatio præsupponit actum.*

The statute of Gloucester is, *quod recuperet rem vastatam*, not *locum vastatum*.

Again it appeareth out of the words of the statute of Gloucester well observed that the tree and the soil are one entire thing; for the words are *quod recuperet rem vastatam*, and yet the books speak, and the very judgment in waste is, *quod recuperet locum vastatum*, which shows that *res* and *locus* are in exposition of law taken indifferently; for the lessor shall not recover only the stem of the tree, but he shall recover the very soil wherewith the stem continues. And therefore it is notably ruled in 22 H. VI. f. 13., that if the termor do first cut down

2 H. 6. f. 13.

[1] "There" in the MS.

the tree, and then destroy the stem, the lessor shall declare upon two several wastes, and recover treble damages for them severally. But, says the book, he must bring but one writ, for he can recover the place wasted but once.

And farther proof may be fitly alleged out of Mullin's case in the Commentaries, where it is said that for timber trees tithes shall not be paid. And the reason of the book is well to be observed; *for that tithes are to be paid for the revenue of the inheritance and not for the inheritance itself.* Soby v. Mollins. Plowd. 470.

Nay, my lords, it is notable to consider, what a reputation the law gives to the trees, even after they are severed by grant, as may be plainly inferred out of Herlackenden's case, L. Coke, p. 4. f. 62. I mean the principal case: where it is resolved that if the trees being excepted out of a lease be granted to the lessee, or if the grantee of trees accept a lease of the land, the property of the trees drowns[1] not, as a term should drown in a freehold, but subsists as a chattel divided; which shows plainly, though they be made transitory, yet they still to some purpose savour of the inheritance; for if you go a little farther, and put the case of a *state tail*, which is a state of inheritance, then I think clearly they are reannexed. But on the other side if a man buy corn standing upon the ground, and take a lease of the same ground where the corn stands, I say plainly it is reaffixed, *for paria copulantur cum paribus.* 4. Co. 62.

And it is no less worthy the note, what an operation the inheritance leaveth behind it in matter of waste, even when it is gone; as appeareth in the case of tenant after possibility, who shall not be punished: for though the new reason be, because his estate was not within the statute of Gloucester; yet I will not go from my old Master Littleton's reason, which speaketh out of the depth of the common law, he shall not be punished *for the inheritance sake which was once in him.*

But this will receive a great deal of illustration by considering the termor's estate, and the nature thereof, which was well defined by Mr. Heath (who spake excellent well to the case) that it is such as he ought to yield up the inheritance in as good plight as he received it; and therefore the word *firmarius* (which is the word of the statute of Marlebridge) cometh (as I conceive) *a firmando*, because he makes the profit of the inheritance, which otherwise should be upon account and un- The derivation and force of the word *firmarius.*

[1] "Drown" in the MS.; and so "subsist" (for "subsists") below.

certain, firm and certain; and accordingly *feodi firma*, — fee-farm, — is a perpetuity certain. Therefore the nature and limit of a particular tenant is to make the inheritance certain, and not to make it worse.

First therefore he cannot break the soil otherwise than with his ploughshare to turn up perhaps a stone, that lieth aloft; his interest is *in superficie* not *in profundo*, he hath but *tunicam terræ*, little more than the vesture.

If we had fir timber here, as they have in Muscovy, he could not pierce the tree to make the pitch come forth no more than he may break the earth.

The evidences *propugnaculum hæreditatis*.

So we see the evidence, which is *propugnaculum hæreditatis*, the fortress and defence of the land, belongeth not to the lessee, but to the owner of the inheritance.

Homage importeth continuance in the blood. Particular tenants of seigniories shall not have aid.

So the lessee's estate is not accounted of that dignity, that it can do homage, because it is a badge of continuance in the blood of lord and tenant. Neither, for my own opinion, can a particular tenant of a manor have aid, *pour file marier, ou pour faire fitz chevalier*; because it is given by law upon an inducement of continuance of blood and privity between lord and tenant.

And for the tree which is now in question; do but consider in what a revolution the law moves, and as it were in an orb: for when the tree is young and tender—*germen terræ*, a sprout of the earth,—the law giveth it to the lessee, as having a nature not permanent, and yet easily restored: when it comes to be a timber-tree, and hath a nature solid and durable, the law carrieth it to the lessor. But after again, if it become a sear and a dotard, and his solid parts grow putrified, and as the poet saith, *non jam mater alit tellus viresque ministrat*, then the law returns it back to the lessee. This is true justice, this is *suum cuique tribuere*, the law guiding all things with line of measure, and proportion.

The phrase that the lessee hath a special property in the tree, very improper; for he hath but the profits of the tree.

And therefore that interest of the lessee in the tree which the books call a special property is scarce worth that name. He shall have the shade, so shall he have the shade of a rock; but he shall not have a crystal, or Bristol diamond growing upon the rock. He shall have the pannage[1]; why, that is the fruit of the inheritance of a tree, as herb or grass is of the soil. He shall have seasonable loppings; why, so he shall have seasonable diggings of an open mine. So all these things are rather

[1] Swine-food, acorns, &c.

profits of the tree, than any special property in the tree. But about words we will not differ.

So as I conclude this part, that the reason and wisdom of law doth match things as they consort, ascribing to permanent states permanent interest, and to transitory states transitory interest; and you cannot alter this order of law, by fancies of clauses and liberties, as I will tell you in the proper place. And therefore the tree standing belongs clearly to the owner of the inheritance.

Now come I to my second assertion; that by the severance, the ownership or property cannot be altered, but that he that had the tree as part of the inheritance before, must have it as a chattel transitory after. This is pregnant, and followeth of itself, for it is the same tree still; and, as the Scripture saith, *uti arbor cadet, ita jacet.*

The owner of the whole must needs own the parts; he that owneth the cloth owneth the thread, and he that owneth an engine when it is entire owneth the parts when it is broken; breaking cannot alter property.

Herlackenden's case.

And therefore the book in Herlackenden's case doth not stick to give it somewhat plain terms, and to say that it were an absurd thing, that the lessee which hath a particular interest in the land, should have an absolute property in that which is part of the inheritance: you would have the shadow draw the body, and the twigs draw the trunk. These are truly called absurdities. And therefore in a conclusion so plain, it shall be sufficient to vouch the authorities without enforcing the reasons.

And although the division be good, that was made by Mr. Heath, that there be four manners of severances, that is, when the lessee fells the tree, or when the lessor fells it, or when a stranger fells it, or when the act of God, a tempest, fells it, yet this division tendeth rather to explanation, than to proof: and I need it not, because I do maintain that in all these cases, the property is in the lessor.

Three arguments of property, damages, seisure, and power to grant.

And therefore I will use a distribution which rather presseth the proof. The question is of property. There be three arguments of property, damages, seisure, and grant: and according to these I will examine the property of the trees by the authority of books.

And first for damages.

For damages, look into the books of the law; and you shall

not find the lessee shall ever recover damages, not as they are a badge of property; for the damages which he recovereth are of two natures, either for the special property (as they call it), or as he is chargeable over. And for this to avoid length I will select three books, one where the lessee shall recover treble damages, another where he shall recover but for his special property, and the third where he shall recover for the body of the tree, which is a special case, and standeth merely upon a special reason.

44 E. 3. f. 27. The first is the book of 44 E. III. f. 27. where it is agreed that if tenant for life be, and a disseissor commit waste, the lessee shall recover in trespass, as he shall answer in waste. But that this is a kind of recovery of damages but *per accidens*, may appear plainly.

For if the lessor die, whereby his action is gone, then the disseisor is likewise discharged otherwise than for the special property.

9 E. 4. f. 35. The second book is 9 E. IV. f. 35. where it is admitted that if the lessor himself cut down the tree, the lessee shall recover but for his special profit of shade, pannage, loppings, because he is not charged over.

44 E. 3. f. 44. The third is 44 E. III. f. 44. where it is said, that if the lessee fell trees, to repair the barn, which is not ruinous in his own default, and the lessor come and take them away, he shall have trespass, and in that case he shall recover for the very body of the tree, for he hath an absolute property in them for that intent.

38 Ass. f. 1. And that it is only for that intent appeareth notably by the book 38 *Ass.* f. 1. If the lessee after he hath cut down the tree employ it not to reparations, but employ other trees of better value, yet it is waste; which showeth plainly the property is respective to the employment.

5 E. 4. f. 100. Nay 5 E. IV. f. 100. goeth farther, and showeth, that the special property which the lessee had was of the living tree, and determines as Herlackenden's case saith by severance; for then *magis dignum trahit ad se minus dignum.* For it saith that the lessee cannot pay the workman's wages with those parts of the tree which are not timber. And so I leave the first demonstration of property, which is by damages; except you will

27 H. 8. f. 13. add the case of 27 H. VIII. f. 13. where it is said, that if tenant for life and he in the reversion join in a lease for years, and lessee for years fell timber trees, they shall join in an action of

waste, but he in the reversion shall recover the whole damages: and great reason, for the special property was in the lessee for years, the general in him in the reversion, so the tenant for life mean had neither the one nor the other.

Now for the seisure; you may not look for plentiful authority in that: for the lessor, which had the more beneficial remedy by action for treble damages, had little reason to resort to the weaker remedy by seisure, and leases without impeachment were then rare, as I will tell you anon. And therefore the question of the seisure came chiefly in experience upon the case of the windfalls which could not be punished by action of waste.

First, therefore, the case of 40 E. III. pl. 22. is express, 40 E. 3. pl. 22.
where at the King's suit in the behalf of the heir of Darcy, who was in ward, the King's lessee was questioned in waste, and justified the taking of the trees, because they were overthrown by winds, and taken away by a stranger. But Knevet saith, *although one be guardian, yet the trees when by their fall they are severed from the freehold, he hath no property of the chattels, but they appertain to the heir;* and the heir shall have trespass of them against a stranger, and not the guardian, no more than the bailiff of a manor. So that that book rules the interest of the tree to be in the heir, and goes to a point[1] farther, that he shall have trespass for them; but of seisure there had been no question.

So again in 2 H. VII. the words of Brian are that for the 2 H. 7. f. 14.
timber-trees *the lessor may take them, for they are his,* and seemeth to take some difference between them and the gravel.

The like reason is of the timber of a house, as appears 34 34 E. 3. f. 5.
E. III. f. 5., abridged by Brook Tit. *Waste*, pl. 34., when it is said it was doubted who should have the timber of a house which fell by tempest; and, saith the book, it seems it doth appertain to the lessor; and good reason, for it is no waste, and the lessee is not bound to reedify it: and therefore it is reason the lessor have it; but Herlackenden's case goes farther, where it is said that the lessee may help himself with the timber if he will reedify it; but clearly he hath no interest, but towards a special employment.

Now you have had a case of the timber-tree, and of the timber of the house; now take a case of the mine, where that of

[1] "appoint" in MS.

9 E. 4. f. 35. the trees is likewise put, and that is 9 E. IV. f. 35. where it is said by Needham, that if a lease be made of land, wherein there is tin, or iron, or lead, or coals, or quarry, and the lessor enter, and take the tin or other materials, the lessee shall punish him for coming upon his land, but not for taking of the substances. And so of great trees. But Danby goes farther and saith, the law that gives him the thing doth likewise give him means to come by it; but they both agree that the interest is in the lessor. And thus much for the seisure.

For the grant, it is not so certain a badge of property as the other two. For a man may have a property, and yet not grantable, because it is turned into a right, or otherwise suspended. And therefore it is true that by the book in 21 H. VI. f. that if the lessor grant the trees, the grantee shall not take them, no not after the lease expired, because this property is but *de futuro, expectant;* but it is as plain on the other side, that the lessee cannot grant them, as was resolved in two notable cases, namely, the case of Marwood and Sanders, 41 El. *in communi banco,* where it was ruled, that the tenant of the inheritance may make a feoffment with exception of timber trees, but that if lessee for life or years set over his estate with an exception of the trees, the exception is utterly void; and the like resolution was in the case between Foster and Mills plaintiffs, and Spenser and Boord defendants, 28 Eliz. rot. 820.

Marwood and Sanders. 5Co. 12.

Foster and Spencer's case.

Now come we to the authorities which have an appearance to be against us, which are not many, and they be easily answered, not by distinguishing subtilly, but by marking the books advisedly.

First, there be two books that seem to cross the authorities touching the interest of the windfalls, 7 H. VI. and 44 E. III. f. 44., where upon waste brought and assigned in the succision of trees, the justification is that they were overthrown by wind, and so the lessee took them for fuel, and allowed for a good plea; but these books are reconciled two ways. First, look into both the justifications, and you shall find that the plea did not rely only in that they were windfalls, but couples it with this, that they were first sere, and then overthrown by wind; and that makes an end of it, for sere trees belong to the lessee, standing or felled, and you have a special replication in the book of 44 E. III. that the wind did but rend them, and buckle

7 H. 6. 44 E. 3. f. 44.

them, and that they bore fruit two years after. And secondly, you have ill-luck with your windfalls, for they be still apple-trees, which are but wastes *per accidens*, as willows or thorns are in the sight of a house: but when they are once felled they are clearly matter of fuel.

Another kind of authorities, that make show against us, are those that say that the lessee shall punish the lessor in trespass for taking the trees, which are 5 H. IV. f. 29. and 1 Mar. *Dyer*, f. 90. Mervin's case; and you might add if you will 9 E. IV. the case vouched before: unto which the answer is, that trespass must be understood for the special property, and not for the body of the tree; for those two books speak not a word what he shall recover, nor that it shall be to the value. And, therefore, 9 E. IV. is a good expositor, for that distinguisheth where the other two books speak indefinitely. Yea, but 5 H. IV. goes farther, and saith, that the writ shall purport *arbores suas*, which is true in respect of the special property; neither are writs to be varied according to special cases, but are framed to the general case; as upon lands recovered in value in tail, the writ shall suppose *donum*, a gift. 5 H. 4. f. 29. Dyer, f. 90

And the third kind of authority is some books (as 13 H. VII. f. 9.) that say, that trespass lies not by the lessor against the lessee for cutting down trees, but only waste; but that is to be understood of trespass *vi et armis*, and would have come fitly in question if there had been no seisure in this case. 13 H. 7. f. 9.

Upon all which I conclude, that the whole current of authorities proveth the properties of the trees upon severance to be in the lessor by the rules of the common law; and that although the common law would not so far protect the folly of the lessor, as to give him remedy by action, where the state was created by his own act, yet the law never took from him his property, so that, as to the property, before the statute and since, the law was ever one.

Now come I to the third assertion, that the statute of Gloucester hath not transferred the property of the lessee upon an intendment of recompense to the lessor: which needs no long speech. It is grounded upon a probable reason, and upon one special book.

The reason is, that damages are a recompense for property; and therefore that the statute of Gloucester giving damages should exclude property: the authority seems to be 12 E. IV. 12 E. 4. 8. a.

f. 8., where Catesbey, affirming that lessee at will shall have the great trees, as well as lessee for years or life, Fairfax and Jennings correct it with a difference, that the lessor may take them in the case of tenant at will, because he hath no remedy by the statute, but not in case of the termor.

This conceit may be reasonable thus far; that the lessee shall not both seise and bring waste, but if he seise he shall not have his action, if he recover by action he shall not seise. For a man shall not have both the thing and recompense. It is a bar to the highest inheritance (the kingdom of Heaven) *receperunt mercedem suam.* But at the first, it is at his election whether remedy he will use; like as in the case of trespass, where if a man once recover in damages it hath concluded and turned the property. Nay, I invert the argument upon the force of the statute of Gloucester thus; that if there had been no property at common law, yet the statute of Gloucester, by restraining the waste, and giving an action, doth imply a property; whereto a better case cannot be put than the case upon the statute *de donis conditionalibus,* where there are no words to give any reversion or remainder, and yet the statute giving a *formedon,* where it lay not before, being but an action, implies an actual reversion and remainder.

A statute giving an action implieth an interest.

Thus have I passed over the first main part, which I have insisted upon the longer, because I shall have use of it for the clearing of the second.

Now to come to the force of the clause, *absque impetitione vasti.* This clause must of necessity work in one of these degrees, either by way of grant of property, or by way of power and liberty knit to the state, or by way of discharge of action: whereof the first two I reject, the last I receive.

No grant of property.

First therefore I think the other side will not affirm that this clause amounts to a grant of trees; for then, according to the resolution in Herlackenden's case, they should go to the executors, and the lessee might grant them over, and they might be taken after the state determined. Now it is plain that this liberty is created with the estate, passeth with the estate, and determines with the estate.

5 H. 5.

That appears by 5 Hen. V. where it is said that if lessee for years without impeachment of waste accept a confirmation for life, the privilege is gone.

3 E. 3. 28 H. 8.

And so are the books in 3 E. III. and 28 H. VIII. that if a

lease be made without impeachment of waste *pour autre vie*, the remainder to the lessee for life, the privilege is gone, because he is in of another estate; so then plainly it amounts to no grant of property, neither can it any ways touch the property, nor enlarge the special property of the lessee. For will any man say, that if you put Marwood and Sanders's case of a lease without impeachment of waste, that he may grant the land with the exception of the trees any more than an ordinary lessee? Or shall the windfalls be more his in this case than in the other? for he was not impeachable of waste for windfalls no more than where he hath the clause. Or will any man say, that if a stranger commit waste, such a lessee may seise? These things, I suppose, no man will affirm. Again, why should not a liberty or privilege in law be as strong as a privilege in fact? as in the case of tenant after possibility? or where there is a lessee for life the remainder for life? For in these cases they are privileged from waste, and yet that trenches not the property.

Now, therefore, to take the second course, that it should be as a real power annexed to the state; neither can that be, for it is the law that mouldeth estates, and not men's fancies. And therefore if men by clauses, like voluntaries in music, run not upon the grounds of law, and do restrain an estate more than the law restrains it, or enable an estate more than the law enables it, or guide an estate otherwise than the law guides it, they be mere repugnancies and vanities. And therefore if I make a feoffment in fee provided the feoffee shall not fell timber, the clause of condition is void. And so on the other side, if I make a lease with a power that he shall fell timber, it's void.

So if I make a lease with a power that he may make feoffment, or that he may make leases for forty years, or that if he make default I shall not be received, or that the lessee may do homage; these are plainly void, as against law, and repugnant to the state. No, this cannot be done by way of use, except the words be apt, as in Mildmay's case: neither is this clause in the sense that they take it, any better. 1 Co. 175.

Therefore, laying aside these two constructions, whereof the one is not maintained to be, the other cannot be: let us come to the true sense of this clause, which is by way of discharge of the action, and no more. Wherein I will speak first of the

words, then of the reason, then of the authorities which prove our sense, then of the practice which is pretended to prove theirs; and, lastly, I will weigh the mischief how it stands for our construction or theirs.

It is an ignorant mistaking if any man take impeachment for *impedimentum*, and not for *impetitio*. For it is true that *impedimentum* doth extend to all hindrances, or disturbances, or interruptions, as well *in pais* as judicial: but *impetitio* is merely a judicial claim or interruption by suit in law, and upon the matter all one with *implacitatio*. Wherein first we may take light of the derivation of *impetitio*, which is a compound of the preposition *in* and the verb *peto*, whereof the verb *peto* itself doth signify a demand, but yet properly such a demand as is not *extrajudicial:* for the words *petit judicium, petit auditum Brevis*, &c. are words of acts judicial; as for the demand *in pais*, it is rather *requisitio*, than *petitio*, as *licet sæpius requisitus*. So much for the verb *peto*. But the preposition *in* enforceth it more, which signifies against: as *Cicero in Verrem, in Catilinam;* and so, in composition, to inveigh is to speak against. So it is such a demand only where there is a party raised to demand against, that is an adversary, which must be in a suit in law. And so it is used in records of law.

As Coke, lib. 1. f. 17., Porter's case, it was pleaded in bar that *dicta domina regina nunc ipsos Johannem et Henricum Porter impetere seu occasionare non debet*, that is, *implacitare*.

So likewise Coke, l. 1. f. 27., case of Alton Woods, *quod dicta domina regina nunc ipsum proinde aliqualiter impetere seu occasionare non debet.*

So in the book of entries, f. 1. *lit.* D. 15 H. VII. rot. 2., *inter placita Regis. Et super hoc venit N. B. Comonachus Abbatis W. loci illius ordinarii, gerensque vices ipsius Abbatis, ad quoscunque clericos de quolibet crimine coram domino Rege impetit' sive irritat' calumniand'.* So much *ex vi et usu termini.*

For reason; first it ought to be considered that the punishment of waste is strict and severe, because the penalty is great; treble damages, and the place wasted: and again, because the lessee must undertake for the acts of strangers. Whereupon I infer, that the reason which brought this clause in use *ab initio* was caution, to save and to free men from the extremity of the penalty, and not any intention to countermand the property.

Add to this, that the law doth assign in most cases double remedy, by matter of suit and matter *in pais;* for disseisins,

actions [and][1] entries; for trespasses, action and seisure; for nuisances, action and abatement; and, as Littleton doth instruct us, one of these remedies may be released without touching the other. If the disseisee release all actions, saith Littleton, yet my entry remains. But if I release all demands, or remedies, or the like words of a general nature, it doth release the right itself. And therefore I may be of opinion, that if there be a clause of grant in my lease expressed that *if my lessee or his assigns cut down and take away any timber-trees that I and my heirs will not charge them by action, claim, seisure, or other interruption,* either this shall inure by way of covenant only, or if you take it to inure by way of absolute discharge, it amounts to a grant of property in the trees: like as the case of 31 *Assis.*[2]; I grant that if I pay not you ten pounds per annum at such feasts, you shall distrain for it in my manor of Dale; though this sound executory in power yet it amounts to a present grant of a rent. So as I conclude that the discharge of action the law knows, grant of the property the law knows, but this same mathematical power being a power amounting to a property, and yet no property, and knit to a state that cannot bear it, the law knoweth not, *tertium penitus ignoramus.*

31 *Assis.* A clause that sounds to a power amounts to a property, if the state bear it.

For the authorities, they are of three kinds, two by inference, and the third direct.

The first I do collect upon the books of 42 Edw. III. fol. 23. and 24., by the difference taken by Mowbray, and agreed by the court, that the law doth intend the clause of disimpeachment of waste to be a discharge special, and not general or absolute. For there the principal case was that there was a clause in the lease, that the lessor *should not demand any right, claim, or challenge in the lands during the life of the lessee:* it is resolved by the book, that it is no bar in waste, but that if the clause had been that the lessee should not have been impeached for waste, clearly a good bar; which demonstrates plainly, that general words, be they never so loud and strong, bear no more than the state will bear, and to any other purpose are idle; but special words that inure by way of discharge of action are good and allowed by law.

42 E. 3. f. 22, 24.

The same reason is of the books 4 Ed. II. Fitzh. tit. waste 15. and 17 E. III. f. 7. Fitzh. tit. waste 101., where there was a clause, *Quod liceat facere commodum suum meliori modo quo*

4 E. 2. Fitzh. tit. waste 15. 17 E. 3. f. 7. Fitzh. tit. waste 101.

[1] Not in MS.

[2] A blank for the folio is left in the MS.

poterit: yet, saith Skipwith, doth this amount, that he shall, for the making of his own profit, disinherit the lessor? *Nego consequentiam.* So that still the law allows not of the general discharge, but of the special, that goeth to the action.

9 H. 6. f. 35. Fitzh. tit. waste 39. Dyer, f. 47.

The second authority by inference is out of 9 H. VI. fol. 35. Fitzh. tit. waste 39., and 32 H. VIII. Dyer, fol. 47., where the learning is taken, that notwithstanding this clause be inserted into a lease, yet a man may reserve unto himself remedy by entry. But say I, if this clause should have that sense which they on the other side would give it, namely, that it should amount to an absolute privilege and power of disposing, then were the proviso flat repugnant, all one as if it were *absque impetitione vasti, proviso quod non faciet vastum*, which are contradictories; and note well that in the book of 9 H. VI. the proviso is *quod non faciat vastum voluntarium in domibus*, which indeed doth but abridge in one kind, and therefore may stand without repugnancy, but in the latter book it is general, that is to say *absque impetitione vasti, et si contigerit ipsum facere vastum tunc licebit reintrare.* And there Shelley making the objection, that the condition was repugnant, it is salved thus, *sed aliqui tenuerunt*, that this word *impetitione vasti* is to be understood that he shall not be impleaded of[1] waste, or punished by action; and so indeed it ought: those *aliqui* rectè *tenuerunt.*

27 H.8. Fitzh. tit. waste 8.

For the authorities direct, they are two, the one 27 H. VI. Fitzh. tit. waste 8., where a lease was made without impeachment of waste, and a stranger committed waste, and the rule is that the lessee shall recover in trespass only for the crop of the tree, and not for the body of the tree. It is true it comes by a *dicitur*, but it is now a *legitur;* and a *quære* there is, and reason; or else this long speech were time ill spent.

And the last authority is the case of Sir Moyle Finch and his mother, referred to my Lord Wrey and Sir Roger Manwood, resolved upon conference with other of the judges, vouched by Wrey in Herlackenden's case, and reported to my Lord Chief Justice here present, as a resolution of law, — being our very case.

Statute of Marlebridge.

And for the cases to the contrary, I know not one in all the law direct. They press the statute of Marlebridge which hath an exception in the prohibition *firmarii non facient vastum, etc.*

[1] "By" in MS.

nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens, quod hoc facere possint. This presseth not the question, for no man doubts but it will excuse in an action of waste; and again *nisi habeant specialem concessionem* may be meant of an absolute grant of the trees themselves. And otherwise the clause *absque impetitione vasti* taketh away the force of the statute and looseth what the statute bindeth, but it toucheth not the property at common law.

For Littleton's case in his title of conditions, where it is said that if a feoffment in fee be made upon condition, that the feoffee shall infeoff the husband and wife, and the heirs of their two bodies; and that the husband die; that now the feoffee ought to make a lease without impeachment of waste to the wife, the remainder to the right heirs of the body of her husband and her begotten; whereby it would be inferred, that such a lessee should have equal privileges with tenant in tail: the answer appears in Littleton's own words, which is that the feoffee ought to go as near the condition, and as near the intent of the condition, as he may, but to come near is not to reach, neither doth Littleton undertake for that. Littleton.

As for Culpepper's case, 2 El. f. 184., it is obscurely put, and concluded in division of opinion; but yet so as it rather makes for us. The case is 2 Eliz. Dyer, fol. 184. and is in effect this. A man makes a lease for years, excepting timber-trees, and afterwards makes a lease without impeachment of waste to John a Style, and then grants the land and trees to John a Down, and binds himself to warrant and save harmless John a Down against John a Style; John a Style cuts down the trees. The question was, whether the bond were forfeited? and that question resorts to the other question; whether John a Style, by virtue of such lease could fell the trees? and held by Weston and Brown that he could not: which proves plainly for us, that he had no property by that clause in the tree; though it is true that, in that case, the exception of the trees turneth the case; and so in effect it proveth neither way. Culpepper's case. Dyer, f. 184.

For the practice: if it is so ancient and common, as is conceived; yet since the authorities have not approved, but condemned it, it is no better than a popular error: it is but *pedum visa est via*, not *recta visa est via*. But I conceive it to be neither ancient nor common. It is true I find it first in 19 E. Practice.

II. (I mean such a clause), but 'tis one thing to say that the clause is ancient, and it is another thing to say, that this exposition, which they would now introduce, is ancient. And therefore you must note, that a practice doth then expound the law, when the act, which is practised, were merely tortious or void, if the law should not approve it; but that's not the case here, for we agree the clause to be lawful; nay, we say that it is in no sort *inutile*, but there is use of it, to avoid this severe penalty of treble damages. But to speak plainly, I will tell you this clause came in from 13 of E. I. till about 12 of E. IV. The state tail, though it had the qualities of an inheritance, yet it was without power to alien: but as soon as that was set at liberty by common recoveries, then there must be found some other device, that a man might be an absolute owner of the land for the time, and yet not enabled to alien, and for that purpose was this clause found out: for you shall not find in one amongst a hundred, that farmers had it in their leases; but those that were once owners of the inheritance, and had put it over to their sons or next heirs, reserved such a beneficial state to themselves. And therefore the truth is, that the flood of this usage came in with perpetuities, save that the perpetuity was to make an inheritance like a state for life, and this was to make a state for life like an inheritance; both concurring in in this, that they presume to create fantastical estates contrary to the ground of law. And therefore it is no matter though it went out with the perpetuities, as it came in; to the end that men that have not the inheritance should not have power to abuse the inheritance.

And for the mischief, and consideration of *bonum publicum*, certainly this clause with this exposition tendeth but to make houses ruinous, and to leave no timber upon the ground to build them up again. And therefore let men in God's name, when they establish their states, and plant their sons or kinsmen in the inheritance of some portions of their lands, with reservation of the freehold to themselves, use it, and enjoy it in such sort, as may tend *ad ædificationem*, and not *ad destructionem*; for that's good for posterity, and for the state in general.

And for the timber of this realm, 'tis *vivus thesaurus regni*; and 'tis the matter of our walls, walls not only of our houses, but of our island: so as 'tis a general disinherison to the kingdom to favour that exposition, which tends to the decay of it.

being so great already; and to favour waste when the times themselves are set upon waste and spoil. Therefore since the reason and authorities of law, and the policy of estate do meet, and that those that have, or shall have such conveyances, may enjoy the benefit of that clause to protect them in a moderate manner, that is, from the penalty of the action, it is both good law and good policy for the kingdom, and not injurious or inconvenient for particulars, to take this clause strictly, and therein to affirm the last report. And so I pray judgment for the plaintiff.

THE

ARGUMENT

IN

LOWE'S CASE OF TENURES

IN THE KING'S BENCH.[1]

THE manor of Alderwasley, parcel of the Duchy and lying out of the county Palatine, was (before the Duchy came to the Crown) held of the King by knight-service *in capite*. The land in question was held of the said manor in *socage*. The Duchy and this manor parcel thereof descended to King Henry IV. King Henry VIII. by letters patent 19° of his reign, granted this manor to Anthony Lowe, grandfather of the ward, and then tenant of the land in question, reserving twenty-six pounds ten shillings rent and fealty *tantum pro omnibus servitiis;* and this patent is under the duchy seal only. The question is *how this tenancy is held, whether in* capite *or in* socage.

The case rests upon two points, unto which all the questions arising are to be reduced. The first is, *whether this tenancy being, by the grant of the King of the manor to the tenant, grown to an unity of possession with the manor, be held as the manor is held,* which is expressed in the patent to be in *socage.*

The second, *whether the manor itself be held in* socage *according to the last reservation, or* in capite *by revivor of the ancient seigniory, which was* in capite *before the Duchy came to the Crown.*

Therefore my first proposition is, that this tenancy (which without all colour is no parcel of the manor) cannot be comprehended within the tenure reserved upon the manor, but that the law createth a several and distinct tenure thereupon; and that not guided according to the express tenure of the

[1] S. C. in Court of Wards, 9 Co. 123., where the decision was adverse to this argument. I do not know whether there was any way in which the cause could be removed into the King's Bench.

manor, but merely *secundum normam legis*, by the intendment and rule of law, which must be a tenure by knight-service *in capite*.

And my second proposition is, that admitting that the tenure of the tenancy should ensue the tenure of the manor, yet nevertheless, the manor itself, which was first held of the Crown *in capite*, and the tenure suspended by the conquest of the Duchy to the Crown, being now conveyed out of the Crown under the duchy seal only; (which hath no power to touch or carry any interest, whereof the King was vested in right of the Crown;) 'tis now so severed and disjoined from the ancient seigniory, which was *in capite*, as the same ancient seigniory is revived, and so the new reservation void, because the manor cannot be charged with two tenures.

The king's tenures may take more hurt by a resolution in law, than by many suppressions or concealments.

This case concerneth one of the greatest and fairest flowers of the crown, which is the King's tenures, and that in their creation, which is more than their preservation: for if the rules and maxims of law in the first raising of tenures *in capite* be weakened, this nips the flower in the bud, and may do more hurt by a resolution in law, than the losses which the King's tenures do daily receive by oblivion or suppression, or the neglect of officers, or the iniquity of jurors, or other like blasts, whereby they are continually shaken. And therefore it behoveth us of the King's council to have a special care of this case as much as in us is to give satisfaction to the court. Therefore before I come to argue these two points particularly, I will speak something of the favour of law towards tenures *in capite*, as that which will give a force and edge to all that I shall speak afterwards.

No land in the kingdom of England charged by way of tribute, and all land charged by way of tenure.

The constitution of this Kingdom appeareth to be a free Monarchy in nothing better than in this; that as there is no land of the subject that is charged to the crown by way of tribute, or tax, or tallage, except it be set by parliament; so on the other side, there is no land of the subject but is charged to the crown by tenure, mediate or immediate, and that by the grounds of the Common Law. This is the excellent temper and commixture of this estate, bearing marks of the sovereignty of the king, and of the freedom of the subject from tax, whose possessions are *feodalia*, not *tributaria*.

Tenures, according to the most general division, are of two natures, the one containing matter of protection, and the other

matter of profit. That of protection is likewise double, divine protection and military. The divine protection is chiefly procured by the prayers of holy and devout men; and great pity it is, that it was depraved and corrupted with superstition. This begot the tenure in *frankalmoigne*, which though in burden it is less than in *socage*, yet in virtue it is more than a knight's service. For we read how during the while Moses in the mount held up his hands the Hebrews prevailed in battle; as well as that when Elias prayed, rain came after drought, which made the plough go; so that I hold that the tenure in frankalmoigne in the first institution indifferent to knight-service and socage. Setting apart this tenure, there remain the other two; that of knight-service, and that of socage; the one tending chiefly to defence and protection, the other to profit and maintenance of life. They are all three comprehended in the ancient verse, *Tu semper ora, tu protege, tuque labora.* But between these two services, knight-service and socage, the law of England makes a great difference. For this kingdom (my lords) is a state neither effeminate nor merchant-like; but the laws give the honour unto arms and military service, like the laws of a nation before whom Julius Cæsar turned his back, as their own prophet says: *Territa quæsitis ostendit terga Britannis.* And therefore howsoever men, upon husbandlike considerations of profit, esteem of socage tenures; yet the law, that looketh to the greatness of the kingdom, and proceedeth upon considerations of estate, giveth the pre-eminence altogether to knight-service.

We see that the ward, who is ward for knight-service land, is accounted in law disparaged, if he be tendered a marriage of the burghers' parentage: and we see that the knights' fees were by the ancient laws the materials of all nobility, for that it appears by divers records how many knights' fees should by computation go to a barony, and so to an earldom. Nay, we see that, in the very summons of parliament, the knights of the shire are required to be chosen *milites gladio cincti;* so as the very call, though it were to council, bears a mark of arms and habiliments of war. To conclude, the whole composition of this warlike nation, and the favour of law, tend to the advancement of military virtue and service.

But now farther, amongst the tenures by knight-service, that of the King *in capite* is the most high and worthy; and

the reason is double; partly because it is held of the King's crown and person, and partly because the law createth such a privity between the line of the Crown and the inheritors of such tenancies, as there cannot be an alienation without the King's license; the penalty of which alienation was by the common law the forfeiture of the state itself, and by the statute of E. III. is reduced to fine and seisure. And although this also have been unworthily termed by the vulgar *captivity*[1] and thraldom; yet that which they count bondage, the law counteth honour; like to the case of tenants in tail of the King's advancement, which is a great restraint by the statute of 34 H. VIII. but yet by that statute it is imputed for an honour. This favour of law to the tenure by knight-service *in capite* produceth this effect, that wheresoever there is no express service effectually limited, or wheresoever that which was once limited faileth, the law evermore supplieth a tenure by knight-service *in capite;* if it be a blank once, that the law must fill it up, the law ever with her own hand writes, *tenure by knight-service* in capite. And therefore the resolution was notable by the judges of both benches, that where the King confirmed to his farmer tenant for life, *tenend' per servitia debita,* this was a tenure *in capite;* for other services are *servitia requisita,* required by the words of patents or grants; but that only is *servitium debitum* by the rules of law. 44 E. 3. f. 45.

The course, therefore, that I will hold in the proof of the first main point, shall be this: First, I will show, maintain, and fortify my former grounds, that wheresoever the law createth the tenure of the King, the law hath no variety, but always raises a tenure *in capite.*

Secondly, that in the case present, there is not any such tenure expressed, as can take place and exclude the tenure in law, but that there is as it were a lapse to the law.

And, lastly, I will show in what cases the former general rule receiveth some show of exception, and will show the difference between them and our case; wherein I shall include an answer to all that hath been said on the other side.

For my first proposition I will divide into four branches; first, I say where there is no tenure reserved, the law createth

[1] The words "not capite" are interlined over this, by way of exhibiting the play on the sound; but I think it is the hand and the lighter-coloured ink of a subsequent corrector, who is not generally happy.

a tenure *in capite;* secondly, where the tenure is uncertain; thirdly, where the tenure reserved is impossible or repugnant to law; and lastly, where a tenure once created is afterwards extinct.

Per Priot in fine, 33 H. 6. f. 7. 8 H. 7. f. 3.

For the first, if the King give lands and say nothing of the tenure, this is a tenure *in capite;* nay, if the King give whiteacre and blackacre, and reserves a tenure only of whiteacre, and that a tenure expressed to be in socage, yet you shall not for fellowship sake (because they are in one patent) intend the like tenure of blackacre; but that shall be held *in capite.*

So if the King grant land held as of a manor with warranty, and a special clause of recompense, and the tenant be impleaded, and recover in value; this land shall be held *in capite*, and not of the manor.

So if the King exchange the manor of Dale for the manor of Sale, which is held in socage, although it be by the word *excambium;* yet that goeth to equality of the state, not of the tenure; and the manor of Dale (if no tenure be expressed) shall be held *in capite.* So much for silence of tenure.

For the second branch, which is incertainty of tenure. First, where an *ignoramus* is found by office, this, by the common law, is a tenure *in capite*, which is most for the King's benefit; and the presumption of law is so strong, that it amounts to a direct finding or affirmative, and the party shall have a negative, or traverse, which is somewhat strange to a thing indefinite.

5 Mar. Dyer, f. 161, 162. [14 Eliz. Dyer, 306.

So if in ancient time one held of the King, as of a manor by knight-service, and the land return to the King by attainder, and then the King granteth it *tenend' per fidelitatem tantum*, and it returneth the second time to the King, and the King granteth it *per servitia antehac consueta;* now because of the incertainty neither service shall take place, and the tenure shall be *in capite*, as was the opinion of you my lord chief justice, where you were commissioner to find an office after Austin's death.

Austin's office.

So if the King grant land *tenend' de manerio de* East Greenwich *vel de honore de* Hampton, this is void, for the non-certainty, and shall be held of the King *in capite.*

33 H. 6. f. 7.

For the third branch; if the King limit land to be discharged of tenure, as *absque aliquo inde reddendo*, this is a tenure *in capite;* and yet if one should go to the next, *ad proximum*, it should be a socage, for the least is next to none at all. But

you may not take the King's grant by argument; but where they cannot take place effectually and punctually as they are expressed, there you shall resort wholly to the judgment of law.

So if the King grant land *tenend' si franckment come il est en son corone*, this is a tenure *in capite*. 14 H. 6. f. 12.

If land be given to be held of a lord[1] not capable, as of Salisbury Plain, or a corporation not *in esse*, or of the manor of a subject, this is a tenure *in capite*. Merefeild's case.

So if land be given to hold by impossible service, as by performing the office of the sheriff of Yorkshire (which no man can do but the sheriff) and fealty, for all service, this is a tenure *in capite*.

For the fourth branch, which cometh nearest to our case, let us see where seigniory was once and is after extinguished. This may be in two manners, by release in fact, or by unity of possession which is a release or discharge in law.

And therefore let the case be, that the King releaseth to his tenant that holds of him in socage; this release is good, and the tenant shall now hold *in capite*, for the former tenure being discharged, the tenure in law ariseth. *Vide* 30 H. 8. Dyer, 44, 45. 8 H. 7. f. 13.

So the case which is in 1 E. III. A fine is levied to J. S. in tail, the remainder ouster to the King, the state tail shall be held *in capite*, and the first tenancy, if it were in socage, by the unity of the tenancy shall be discharged, and a new raised thereupon: and therefore the opinion, or rather the *quaere*, in Dyer, no law. 1 E. 3. f. 4. fine accept; unde collect.[2]

Thus much for my major proposition: now for the minor, or the assumption, it is this: first, that the land in question is discharged of tenure by the purchase of the manor; then that the reservation of the service upon the manor cannot possibly inure to the tenancy; and then if a corruption be of the first tenure, and no generation of the new, then cometh in the tenure *per normam legis*, which is *in capite*. 4 et 5 P. M.

And the course of my proof shall be *ab enumeratione partium*, which is one of the clearest and most forcible kinds of argument.

If this parcel of land be held by fealty and rent *tantum*, either it is the old fealty before the purchase of the manor, or it is

[1] The MS. has only L.: The Editions have it, "lordships."
[2] So in MS. I cannot interpret it.

the new fealty reserved and expressed upon the grant of the manor; or it is a new fealty raised by intendment of law in conformity and congruity of the fealty reserved upon the manor; but none of these: *ergo*, &c.

That it should be the old fealty, is void of sense; for it is not *ad eosdem terminos*. The first fealty was between the tenancy and the manor; that tenure is by the unity extinct. Secondly, that was a tenure of a manor, this is a tenure in gross. Thirdly, the rent of twenty-six pounds ten shillings must needs be new, and will you have a new rent with an old fealty? These things are *portenta in lege*; nay, I demand if the tenure of the tenancy (Lowe's tenure) had been by knight-service, would you have said that had remained? No, but that it was altered by the new reservation; *ergo* no colour of the old fealty.

That it cannot be the new fealty is also manifest. For the new reservation is upon the manor, and this is no part of the manor: for if it had escheated to the King in an ordinary escheat, or come to him upon a mortmain, in these cases it had come in lieu of the seigniory, and been parcel of the manor, and so within the reservation, but clearly not upon a purchase in fact.

Again the reservation cannot inure, but upon that which is granted; and this tenancy was never granted, but was in the tenant before; and therefore no colour it should come under the reservation. But if it be said, that nevertheless the seigniory of that tenancy was parcel of the manor, and is also
3 Co. 80. granted, and although it be extinct in substance, yet it may be *in esse*, as to the King's service; this deserveth answer; for this assertion may be colourably inferred out of Carr's case.

King Edward VI. grants a manor, rendering ninety-four pounds rent in fee farm *tenendum de* East Greenwich in socage; and after, Queen Mary grants these rents amongst other things *tenendum in capite*, and the grantee released to the heir of the tenant; yet the rent shall be *in esse*, as to the King, but the land (saith the book) shall be devisable by the statute for the whole, as not held *in capite*.

Ass. pl. 60. And so the case of the honour of Pickering, where the King granted the bailiwick, rendering rent, and after granted the honour, and the bailiwick became forfeited, and the grantee took forfeiture thereof, whereby it was extinct; yet the rent remaineth as to the King out of the bailiwick extinct.

These two cases partly make not against us, and partly make for us. There be two differences that avoid them. First, there the tenures or rents are *in esse* in those cases for the King's benefit, and here they should be *in esse* to the King's prejudice, who should otherwise have a more beneficial tenure. Again, in these cases the first reservation was of a thing *in esse* at the time of the reservation; and then there is no reason the act subsequent of the King's tenant should prejudice the King's interest once vested and settled: but here the reservation was never good, because it is out of a thing extinct in the instant.

But the plain reason which turneth Carr's case mainly for us is; for that where the tenure is of a rent or seigniory, which is afterwards drowned or extinct in the land, yet the law judgeth the same rent or seigniory to be *in esse*, as to support the tenure: but of what? only of the said rent or seigniory, and never of the land itself: for the land shall be held by the same tenure it was before. And so is the rule of Carr's case, where it is adjudged that though the rent be held *in capite*, yet the land was nevertheless devisable for the whole as no ways charged with that tenure.

Why then in our case, let the fealty be reserved out of the seigniory extinct, yet that toucheth not at all the land. And then of necessity the land must be also held; and therefore you must seek out a new tenure for the land, and that must be *in capite*.

And let this be noted once for all, that our case is not like the common cases of a meanalty extinct, where the tenant shall hold of the lord as the mean held before; as where the meanalty is granted to the tenant, or where the tenancy is granted to the mean, or where the meanalty descendeth to the tenant, or where the meanalty is forejudged. In all these cases the tenancy (I grant) is held as the meanalty was held before; and the difference is, because there was an old seigniory in being which remaineth untouched and unaltered, save that it is drawn a degree nearer to the land; so as there is no question in the world of a new tenure. But in our case there was no *lord paramount;* for the manor itself was in the Crown, and not held at all, nor no seigniory of the manor *in esse*, so as the question is wholly upon the creation of a new seigniory, and not upon the continuance of an old.

For the third course, that the law should create a new distinct tenure by fealty of this parcel, guided by the express tenure uponthe manor; it is the probablest course of the three: but yet, if the former authorities I have alleged be well understood and marked, they show the law plainly, that it cannot be. For you shall ever take the King's grant *ad idem*, and not *ad simile*, or *ad proximum;* no more than in the case of the *absque aliquo reddendo*, or as free as the Crown. Who would not say that in those cases it should amount to a socage tenure; for *minimum est nihilo proximum:* and yet they are tenures by knight-service *in capite.* So if the King by one patent pass two acres, and a fealty reserved but upon the one of them, you shall not resort to this, *ut expressum servitium regat vel declaret tacitum.* No more shall you in our case imply that the express tenure reserved upon the manor shall govern or declare the tenure of the tenancy, or control the intendment of law concerning the same.

Now will I answer the cases which give some shadow on the contrary side, and show they have their particular reasons, and do not impugn our case.

First if the King have land by attainder of treason, and grant the land to be held of himself and of other lords, this is no new tenure *per normam legis communis*, but the old tenure *per normam statuti*, which taketh away the intendment of the common law; for the statute directeth it so, and otherwise the King shall do a wrong.

So if the King grant land parcel of the demesne of a manor *tenendum de nobis*, or reserving no tenure at all, this is a tenure of the manor or of the honour, and not *in capite:* for here the more vehement presumption controlleth the less; for the law doth presume the King hath no intent to dismember it from the manor, and so to lose his court and the perquisites.

26 H. 6. f. 56. b. So if the King grant land *tenendum* by a rose *pro omnibus servitiis;* this is not like the cases of the *absque aliquo inde reddendo*, or as free as the crown: for *pro omnibus servitiis* shall be intended for all express service; whereas fealty is incident, and passeth *tacite*, and so it is no impossible or repugnant reservation.

This is no frankalmoigne. The case of the frankalmoigne (I mean the case where the King grants lands of the Templers to J. S. to hold as the Templers did), which cannot be frankalmoigne, and yet hath

been ruled to be no tenure by knight-service *in capite,* but only a socage tenure, is easily answered, for that the frankalmoigne is but a species of a tenure in socage with a privilege; so the privilege ceaseth, and the tenure remains. Wood's case.

To conclude, therefore, I sum up my argument thus: my major is, where *calamus legis* doth write the tenure it is knight-service *in capite:* my minor is, this tenure is left to the law. *Ergo,* this tenure is *in capite.*

For the second point I will first speak of it according to the rules of the common law, and then upon the statutes of the duchy.

First I do grant, that where a seigniory and a tenancy, or a rent and land, or trees and land, or the like primitive and secondary interests are conjoined in one person, yea though it be *in autre droit,* yet if it be of like perdurable estate, they are so extinct, as by act in law they may be revived, but by grant they cannot.

For if a man have a seigniory in his own right, and the land descends to his wife, and his wife dieth without issue, the seigniory is revived; but if he will make a feoffment in fee, saving his rent, he cannot do it. But there is a great difference, and let it be well observed, between *autre capacitie* and *autre droit;* for in case of *autre capacitie* the interests are *contigua,* and not *continua,* conjoined, but not confounded. And therefore if the Master of an hospital have a seigniory, and the Mayor and commonalty of St. Albans have a tenancy, and the master of the hospital be made mayor, and the mayor grant away the tenancy under the seal of the Mayor and commonalty, the seigniory of the hospital is revived.

So between natural capacity and politic; if a man have a seigniory to him and his heirs, and a bishop is tenant, and the lord is made bishop, and the bishop, before the statute, grants away the land under the Chapter's seal, the seigniory is revived.

The same reason is between the capacity of the Crown and the capacity of the Duchy, which is in the King's natural capacity, though illustrate with some privileges of the Crown; if the King have the seigniory in the right of his crown, and the tenancy in the right of the Duchy (as our case is) and make a feoffment of the tenancy, the tenure must be revived; and this is by the ground of the common law. But the case is the more strong by reason of the statutes of 1 H. IV. 3 H. V. and

1 H. VII. of the duchy, by which the Duchy seal is enabled to pass lands of the duchy, but no ways to touch the Crown: and whether the King be in actual possession of the thing, that should pass, or have only a right, or a condition, or a thing in suspense (as our case is) all is one; for that seal will not extinguish so much as a spark of that which is in the right of the Crown. And so a plain revivor.

And if it be said that a mischief will follow, for that upon every Duchy patent men shall not know how to hold, because men must go back to the ancient tenure, and not rest in the tenure limited; for this mischief there grows an easy remedy which likewise is now in use, which is to take both seals, and then all is safe.

Secondly, as the King cannot under the duchy seal grant away his ancient seigniory in the right of his crown, so he cannot make any new reservation by that seal; and so of necessity it falleth to the law to make the tenure. For every reservation must be of the nature of that that passeth, as a Dean and Chapter cannot grant land of the Chapter, and reserve a rent to the dean and his heirs, nor *è converso:* nor no more can the King grant land of the Duchy under that seal and reserve a tenure to the Crown; and therefore it is warily put in the end
Plowd. 223. of the case of the Duchy in the Commentaries, where it is said if the King make a feoffment of the duchy land the feoffee shall hold *in capite;* but not a word of that it should be by way of express reservation, but upon a feoffment simply the law shall work it and supply it.

To conclude, there is direct authority in the point, but that it is *via versa;* and it was the Bishop of Salisbury's case. The King had in the right of the Duchy a rent issuing out of land which was monastery land, which he had in the right of the Crown, and granted away the land under the great seal to the bishop: and yet nevertheless the rent continued to the Duchy, and so upon great and grave advice it was in the Duchy decreed. So, as your lordship seeth, whether you take the tenure of the tenancy, or the tenure of the manor, this land must be held *in capite:* and therefore, &c.

LADY STANHOPE'S CASE.[1]

The Case shortly put without names or dates more than of necessity is this.

Sir John[2] Stanhope conveys the manor of Burrowash to his lady for part of her jointure, and intending (as is manifest) not to restrain himself nor his son from disposing some proportion of that land according to their occasions, so as my lady were at no loss by the exchange, inserts into the conveyance a power of revocation and alteration in this manner: *provided that it shall be lawful for himself and his son successively to alter and make void the uses, and to limit and appoint new uses, so it exceed not the value of twenty pounds, to be computed after the rents then answered, and that immediately after such declaration, or making void, the feoffees shall stand seised to such new uses;* ita quod, *he or his son within six months after such declaration or making void shall assure, within the same towns* tantum terrarum et tenementorum, et similis valoris *as were so revoked, to the uses expressed in the first conveyance.*

Sir John Stanhope, his son, revokes the land in Burrowash and other parcels, not exceeding the value of twenty pounds, and within six months assures to my lady and to the former uses Burton Joyce, and other lands; and the jury have found that the lands revoked contain twice so much in number of acres, and twice so much in yearly value, as the new lands, but yet that the new lands are rented at twenty-one pounds, and find the lands of Burrowash now out of lease formerly made: and that no notice of this new assurance was given before the ejectment, but only that Sir John Stanhope had by word told his mother that such an assurance was made, not showing or delivering the deed.

The question is, Whether Burrowash be well revoked: which question divides itself into three points.

[1] I have not found any Report of this case.

[2] So in MS.; but apparently the father is Thomas, and the son John. See further on.

First, whether the *ita quod* be a void and idle clause? For if so, then there needs no new assurance, but the revocation is absolute *per se.*

The next is, if it be an effectual clause, whether it be pursued or no? Wherein the question will rest, whether the value of the reassured lands shall be only computed by rents.

And the third is, if in other points it should be well pursued; yet whether the revocation can work until a sufficient notice of the new assurance?

And I shall prove plainly that *ita quod* stands well with the power of revocation; and if it should fall to the ground it draws all the rest of the clause with it, and makes the whole void, and cannot be void alone by itself.

I shall prove likewise that the value must needs be accounted not a tale value, or an arithmetical value by the rent, but a true value in quantity and quality.

And lastly that a notice is of necessity as this case is.

I will not deny, but it is a great power of wit to make clear things doubtful; but it is the true use of wit to make doubtful things clear, or at least to maintain things that are clear to be clear, as they are. And in that kind I conceive my labour will be in this case, which I hold to be a case rather of novelty than difficulty, and therefore may require argument, but will not endure much argument. But to speak plainly to my understanding as the case hath no equity in it (I might say piety) so it hath no great doubt in law.

First, therefore, this 'tis that I affirm; that the clause "so that," *ita quod*, containing the recompense, governs the clause precedent of the power, and that it makes it wait and expect otherwise than as by way of inception; but the effect and operation is suspended till that part also be performed; and if otherwise, then I say plainly, you shall not construe by fractions, but the whole clause and power is void, not *in tanto*, but *in toto.* Of the first of these I will give four reasons.

The first reason is, that the wisdom of the law useth to transpose words according to the sense, and not so much to respect how the words do place[1], but how the acts, which are guided by those words, may take place.

Hill and Hill and Graunger's case, Comment. 171. A man in August

[1] The MS. has "take place," with the first word struck out. The editions have retained it, but I think erroneously.

makes a lease, rendering ten pounds rent yearly to be paid at the feasts of Annunciation and Michaelmas. These words shall be inverted by law, as if they had been set thus, at Michaelmas and the Annunciation, for else he cannot have a rent yearly; for there will be fourteen months to the first year. Graunger's case. Plowd. f. 171.

Fitzwilliams's case, 2 Jac. Co. pa. 6. f. 33. It was contained in an indenture of uses, that Sir William Fitzwilliams should have power to alter and change, revoke, determine, and make void the uses limited. The words are placed disorderly; for it is in nature first to determine the uses, and after to change them by limitation of new. But the chief question being in the book whether it might be done by the same deed, it is admitted and thought not worth the speaking to, that the law shall marshal the acts against the order of the words; that is, first to make void, and then to limit. Fitzwilliams's case 6 Co. 33.

So if I convey land, and covenant with you to make farther assurance, so that you require it of me; there, though the request be placed last, yet it must be acted first.

So if I let land to you for a term, and say further it shall be lawful for you to take twenty timber trees to erect a new tenement upon the land, so that my bailiff do assign you where you shall take them; here the assignment, though last placed, must precede. And therefore the grammarians do infer well upon the word "period," which is a full and complete clause or sentence, that it is *complexus orationis circularis:* for as in a circle there is not *prius* nor *posterius*, so in one sentence you shall not respect the placing of words, but though the words lie in length, yet the sense is round, so as *prima erunt novissima et novissima prima.* For though you cannot speak all at once, so yet you must construe and judge upon all at once.

To apply this; I say these words *so that*, though *loco et textu posteriora*, yet they be *potestate et sensu priora;* as if they had been penned thus, that it shall be lawful for Sir Thomas Stanhope, so that he assure lands, &c. to revoke; and what difference between "so that he assure, he may revoke," or "he may revoke, so that he assure:" for you must either make the "so that" to be precedent or void, as I shall tell you anon. And therefore the law will rather invert the words than pervert the sense.

But it will be said, that in the cases I put it is left indefinite, when the act last limited shall be performed, and so the law

may marshal it as it may stand with possibility; and so if it had been in this case no more but, "so that Sir Thomas or John should assure new lands," and no time spoken of, the law might have intended it precedent; but in this case it is precisely put to be at any time within six months after the declaration, and therefore you cannot vary in the times.

To this I answer that the new assurance must be indeed in time after the instrument or deed of the declaration, but on the other side, it must be in time precedent to the operation of the law by determining the uses thereupon. So as it is not to be applied so much to the declaration itself, but to the warrant of the declaration,— *it shall be lawful, so that* &c. And this will appear more plainly by my second reason, to which now I come; for as for the cavillation upon the word *immediately*, I will speak to it after.

My second reason therefore is out of the use and signification of this conjunction or bond of speech, *so that:* for no man will make any great doubt of it, if the words had been *si*,—"if Sir Thomas shall within six months of such declaration convey,"— but that it must have been intended precedent; yet if you mark it well, these words *ita quod* and *si*, howsoever in propriety the *ita quod* may seem subsequent and the *si* precedent, yet they both bow to the sense.

Colthurst's case. Plowd. f. 21.

So we see in 4 Edw. VI. Colthurst's case. A man leaseth to J. S. a house, *si ipse vellet habitare et residens esse:* there the word *si* amounts to a condition subsequent, for he could not be resident before he took the state; and so *via versa* may *ita quod* be precedent, for else it must be idle and void. But I go farther, for I say *ita quod*, though it be good words of condition, yet more properly it is neither condition precedent, nor subsequent, but rather a qualification, or form, or adherent to the acts whereto it is joined, and made part of their essence; which will appear evidently by other cases. For allow it had been thus, *so that the deed of declaration be enrolled* within six months, this is all one as by deed inrolled within six months, as it is said in Digg's case, 42 Eliz. f. 173., that "by deed indented to be inrolled" is all one with "deed indented and inrolled:" it is but a *modus faciendi*, a description, and of the same nature is the *ita quod*. So if it had been thus, it shall be lawful for Sir Thomas to declare, *so that the declaration be* with the consent of my lord chief justice, is it not all one with

Digg's case, 1 Co. 173.

the more compendious form of penning, that Sir Thomas *shall declare with the consent of my lord chief justice?* And if it had been thus, so that Sir John within six months after such declaration shall obtain the consent of my lord chief justice, should not the uses have expected? But these you will say are forms and circumstances annexed to the conveyance required; why surely any collateral matter coupled by the *ita quod* is as strong. If the *ita quod* had been, that Sir John Stanhope within six months should have paid my lady one thousand pounds, or entered into bond never more to disturb her, or the like; all these make but one entire idea or notion, how that his power should not be categorical, or simple at pleasure, but hypothetical, and qualified, and restrained, that is to say, not the one without the other; and they are parts incorporated into the nature and essence of the authority itself.

The third reason is, the justice of the law in taking words so as no material part of the parties' intent perish. For as one saith, *præstat torquere verba, quam homines*, better wrest words out of place than wrest my Lady Stanhope out of her jointure, that was meant to her. And therefore it is elegantly said in Fitzwilliams's case which I vouched before; though words be contradictory, and (to use the phrase of the book) *pugnant tanquam ex diametro*, yet the law delighteth to make atonement, as well between words as between parties, and will reconcile them, so as they may stand, and abhorreth *vacuum*, as well as nature abhorreth it; and as nature, to avoid *vacuum*, will draw substances contrary to their propriety, so will the law draw words. Therefore saith Littleton, if I make a feoffment *reddendo* rent to a stranger, this is a condition to the feoffor, rather than it shall be void; which is quite cross; it sounds a rent, it works a condition; it is limited to a third person, it inureth to the feoffor. And yet the law favoureth not conditions, but to avoid *vacuum*.

So in the case of 45 E. III. a man gives land in frank-marriage, the remainder in fee. The frank-marriage is first put, and that can be but by tenure of the donor; yet rather than the remainder should be void, though it be last placed, the frank-marriage being but a privilege of estate shall be destroyed. 5 R. 2.

So 30 H. VI. Tressham's case. The King granteth a wardship, before it fall; good, because it cannot inure by covenant,

and if it should not be good by plea, as the book terms it, it were void: so that, no not in the King's case, the law will not admit words to be void.

So then the intent appears most plainly, that this act of Sir John should be *actus geminus*, a kind of twin[1] to take back, and to give back, and to make an exchange, and not a resumption; and therefore upon a conceit of repugnancy, to take the one part which is the privation of my lady's jointure, and not the other which is the restitution or compensation, were a thing utterly injurious in matter, and absurd in construction.

The fourth reason is out of the nature of the conveyance,—which is by way of use, and therefore ought to be construed more favourably according to the intent, and not literally or strictly: for although it be said in Freine and Dillon's case, and in Fitzwilliams's case, that it is safe so to construe the statute of 27 H. VIII. as that uses may be made subject to the rules of the common law, which the professors of the law do know, and not leave them to be extravagant and irregular; yet if the late authorities be well marked, and the reason of them, you shall find this difference, that uses, in point of operation, are reduced to a kind of conformity with the rules of the common law; but that, in point of exposition of words, they retain somewhat of their ancient nature, and are expounded more liberally according to the intent; for with that part the statute of 27 doth not meddle. And therefore if the question be, whether a bargain and sale upon condition be good to reduce the state back without an entry, or whether, if a man make a feoffment in fee to the use of John a Style for years, the remainder to the right heirs of John a Downe, this remainder be good or no; these cases will follow the grounds of the common law for possessions, in point of operation; but so will it not be in point of exposition.

For if I have the manor of Dale and the manor of Sale, lying both in Vale, and I make a lease for life of them both, the remainder of the manor of Dale and all other my lands in Vale to John a Style, the remainder of the manor of Sale to John a Downe, this latter remainder is void, because it comes too late, the general words having carried it before to John a Style.

[1] "Twyne" in the MS., which the editions print "twine." I cannot myself attach any meaning to this reading, and therefore, guided by the preceding *geminus*, have printed "twin."

But put it by way of use; a man makes a feoffment in fee of both manors, and limits the use of the manor of Dale and all the other lands in Vale to the use of himself and his wife, for her jointure; and of the manor of Sale to the use of himself alone. Now his wife shall have no jointure in the manor of Sale, and so was it judged in the case of the manor of Odiam.[1] The case of the manor of Odiam.

And therefore our case is more strong, being by way of use; and you may well construe the latter part to control and qualify the first, and to make it attend and expect; nay, it is not amiss to see the case of Peryman, 41 Eliz. Coke, p. 5. f. 84. where by custom a livery may expect; for the case was, that in the manor of Portchester the custom was, that a feoffment of land should not be good, except it were presented within a year in the court of the manor; and there ruled that it was but *actus inchoatus*, till it was presented. Now if it be not merely against reason of law, that so solemn a conveyance as livery, which keeps state (I tell you), and will not wait, should expect a farther perfection, *a fortiori* may a conveyance in use or declaration of use, receive a consummation by degrees, and several acts. And thus much for the main point. 5 Co. f. 84.

Now for the objection of the word *immediate;* it is but light and a kind of sophistry. They say that the words are, *that the uses shall rise immediately after the declaration*, and we would have an interposition of an act between, *viz:* that there should be a declaration first, then a new assurance within the six months, and lastly the uses to rise: whereunto the answer is easy; for we have showed before that the declaration and the new assurance are in the intent of him that made the conveyance, and likewise in eye of law, but as one compounded act. So as *immediately after the declaration* must be understood of a perfect and effectual declaration, with the adjuncts and accouplements expressed.

So we see in 49 E. III. f. 11. if a man be attainted of felony that holds lands of a common person, the King shall have his year, day, and waste: but when? Not before an office found. And yet the words of the statute of *prærogativa regis* are, *Rex habebit catalla felonum*, et *si ipsi habent liberum tenementum* statim capiatur *in manus domini, et rex habebit annum, diem et vastum:* and here the word *statim* is understood of the effectual and lawful time, that is, after office found. 49 E. 3. f. 11.

[1] Probably Odiham.

2 H. 4. f. 17. So in 2 H. IV. f. 17. it appears that by the statute of Acton Burnell, if the debt be acknowledged, and the day past, that the goods of the debtors shall be sold *statim*, in French *maintenant*; yet nevertheless this *statim* shall not be understood, not before the process of law requisite passed, that is, the day comprised in the extent.

27 H. 8. f. 19. So it is said 27 H. VIII. f. 19. by Audley the Chancellor, that the present tense shall be taken for the future; *a fortiori* say I the immediate future tense may be taken for a distant future tense. As if I be bound that my son being of the age of twenty-one years shall marry your daughter, and that he be now of twelve years; yet this shall be understood, when he shall be of the age of twenty-one years. And so in our case, *immediately after the declaration* is intended, when all things shall be performed that are coupled with the said declaration.

But in this I doubt I labour too much; for no man will be of opinion that it was intended that the Lady Stanhope should be six whole months without either the old jointure or the new; but that the old should expect until the new were settled without any *interim*. And so I conclude this course of atonements (as Fitzwilliams's case calls it); whereby I have proved that all the words, by a true marshalling of the acts, may stand according to the intent of the parties.

I may add *tanquam ex abundanti*, that if both clauses do not live together, they must both die together; for the law loves neither fractions of estates nor fractions of constructions. And

Jermin and Ascough's case. 37 Eliz. therefore in Jermin and Askew's case, 37 Eliz., a man did devise lands in tail with proviso, that if the devisee did attempt to alien, his estate should cease, as if he were naturally dead. Is it said there that the words *as if he were naturally dead* shall be void, and the words *that his estate shall cease*, good? No, but the whole clause shall be void. And it is all one reason of a *so that*, as of an *as if*, for they both suspend the sentence.

So if I make a lease for life, upon condition he shall not alien, nor take the profits, shall this be good for the first part, and void for the second? No, but it shall be void for both.

So if the power of declaration of uses had been thus penned; that Sir John Stanhope might by his deed indented declare new uses, so that the deed were inrolled before the Mayor of St. Albans, who hath no power to take inrolments; or so that the deed were made in such sort, as might not be made void

by Parliament; in all these and the like cases the impossibility of the last part doth strike upwards, and infect and destroy the whole clause. And therefore, that all the words may stand is the first and true course; that all the words be void, is the second and probable; but that the revoking part should be good, and the assuring part void, hath neither truth nor probability.

Now come I to the second point, how this value should be measured; wherein methinks you are as ill a measurer of values as you are an expounder of words. Which point I will divide, first considering what the law doth generally intend by the word *value;* and secondly to see what special words may be in these clauses, either to draw it to a value of a present arrentation, or to understand it of a just and true value.

The word *value* is a word well known to the law, and therefore cannot be (except it be willingly) misunderstood. By the common law there is upon a warrant a recovery in value. I put the case therefore that I make a feoffment in fee with warranty of the manor of Dale, being worth twenty pounds *per annum,* and then in lease for twenty shillings. The lease expires; (for that is our case, though I hold it not needful;) the question is whether upon an eviction there shall not be recovered from me land to the value of twenty pounds.

So if a man give land in frank-marriage then rented at forty pounds and no more worth; there descendeth other lands, let perhaps for a year or two for twenty pounds, but worth eighty pounds: shall not the donee be at liberty to put this land in hotchpot?

So if two parceners be in tail, and they make partition of lands equal in rent, but far unequal in value; shall this bind their issues? By no means. For there is no calender so false to judge of values as the rent, being sometimes improved, sometimes ancient, sometimes where great fines have been taken, sometimes where no fines; so as in point of recompense you were as good put false weights into the hands of the law, as to bring in this interpretation of value by a present arrentation. But this is not worth the speaking to in general: that which giveth colour is the special words in the clause of revocation, that the twenty pounds' value should be according to the rents then answered, and therefore that there should be a correspondence in the computation likewise of the recompense.

But this is so far from countenancing that exposition, as, well noted, it crosseth it; for *oppositajuxta se posita magis elucescunt:* first, it may be the intent of Sir Thomas in the first clause was double, partly to exclude any land in demesne, partly because knowing the land was double, and as some say quadruple, better than the rent, he would have the more scope of revocation under his twenty pounds' value.

But what is this to the clause of recompense? First, are there any words *secundum computationem prædictam?* There are none. Secondly, doth the clause rest upon the words *similis valoris?* No, but joineth *tantum et similis valoris.* Confound not predicaments; for they are the mere-stones of reason. Here is both quantity and quality. Nay he saith farther, within the same towns. Why? Marry it is somewhat to have men's possessions lie about them, and not dispersed. So it must be as much, as good, as near: so plainly doth the intent appear, that my Lady should not be a loser.

For the point of the notice, it was discharged by the Court.

THE

ARGUMENTS

ON THE

JURISDICTION OF THE COUNCIL OF THE MARCHES.

PREFACE.

THESE arguments were delivered in the course of a contest of some historical interest, which was carried on, in the Courts, in Parliament, and out of doors, through the greater part of James's reign, and indeed earlier. The dispute, in its legal aspect, is closely connected with large constitutional questions, which then occupied the minds of men; and the discontent which sustained it may, perhaps, be deemed as much a symptom of the general ferment which was everywhere souring the relations of the Court and country, as directly ascribable to substantial grievances inflicted by the Council on those subject to its jurisdiction: nevertheless the matter has a separable history of its own, a summary of which may not be out of place as an introduction to these arguments.[1]

The Court of "the President and Council in the Dominion and Principality of Wales and the Marches of the same," originating in earlier and more disturbed times, was confirmed by Parliament 34 35 Hen. VIII. c. 26., one of a series of statutes for regulating that province, and giving large legislative powers to the King for that purpose. It was armed with discretionary power over such matters as should be assigned to it by the King, "as theretofore had been accustomed and used."

The more noted Council of York had been erected some years earlier without either statute or custom to support it; as had also a third Provincial Council for the Western Parts, which, however, was soon dropt, owing, as Coke tells us[2], to strong local opposition. All three Councils are recognised as a meritorious cause of expense to the King in the Subsidy Act

[1] A large mass of materials are collected in a volume of the Cotton MSS. Vitellius C. i. devoted to this subject and referred to by Mr. Hallam. See also Cott. MSS. Titus B. viii. Many of the same documents, and a great number of others are in the State Paper Office. Mr. Spedding had copied some of the most important, and made extracts from others, before I began my task: the publication of the Calendar has made it easy for me to glean some further information.

[2] 4th Inst. 246.

of 32 Hen. VIII. c. 50.[1], before the Welsh Act was passed, the point specially singled out for praise being the cheap and speedy justice administered in them to rich and poor. The enactment in 34 Hen. VIII. was therefore not occasioned by any doubt or hesitation of the King about erecting such Courts generally by his own authority, but probably by the necessity for distinctly mentioning what old Institutions were still to stand, amidst so much innovation taking place in Wales: and the question remains quite open, whether the four English Shires with which these arguments are concerned, or Chester and Bristol which had at first been subject to the Council, were in fact at the time conceived to be comprised in the words of the statute.

The sturdiest constitutionalists have admitted the benefits which in certain stages of English society were obtained from such a tribunal as the Star Chamber, curbing local combination, oppression, and corruption: an equitable temperament of the Common Law, as administered by our lawyers, could hardly be dispensed with: the economy of time and costs which may be secured by means of local Courts is now a trite subject: and I know no reason why Henry and his ministers should not be supposed to have meant honestly when these Provincial Courts were established.[2] Nevertheless, without dwelling on the validity of the motives which caused the constant Parliamentary opposition to their great Metropolitan exemplars, it is not difficult to picture to ourselves the abuses of every sort that might gather head in such Courts, when acting at a distance from central opinion and control, under the presidency of noblemen chosen by Court favour and not generally trained in legal habits; exercising a censorial as well as a strictly criminal jurisdiction; unfettered by definite rules of proceeding; and conducting inquiries by examination of the supposed offender, aided in cases of treason and felony by torture in the discretion of the Court[3]; in civil questions staying, setting

[1] This Act, which is not inrolled in Chancery, seems to have escaped notice while the controversy was going on in James's reign; and, strangely enough, Coke, who was aware of it, at all events, when writing the 4th Institutes, cites it only as recognising the existence of the Councils of York and the West.

[2] The tenor of the instructions to the Welsh Council, when the Princess Mary was sent down to the Principality, before the Act of Parliament Cott. MSS. Vit. (C. I.), and the authority to the Northern Council, as stated by Coke (4 Inst. 245), lead fairly to the inference that the discretionary powers, criminal and civil, were at first intended to supplement, not to supersede the Common Law procedure.

[3] This power is openly and without circumlocution given in a series of instructions,

aside, and inverting, within ill-defined limits, the proceedings and principles of the ordinary Courts; and partly dependent for its support on the fines which it imposed for contempt and offences, and on fees ascertained by a custom of which the lower officials were the ordinary interpreters.

Orders for reformation of the Court, which were issued by Lord Burleigh in 1579, and instructions[1] to the President, Lord Pembroke, in 1586, are official recognitions of the existence of maladministration such as might have been surmised: delays, excessive costs, encroachment on the Common Law, extortion by means of fining, and an exercise of the inquisitorial powers of the Court, which even in those days was thought vexatious. It seems reasonable to assume that these abuses were, in part at least, the cause of the efforts which during the first half of Elizabeth's reign were made to have the territorial jurisdiction of the Council restricted; though we must no doubt also take account of the natural resentment of the English at being coupled with the Welshmen, and of disputes of privilege with the Common Law Judges and other local Courts. Chester, so far as appears, was exempted on occasion of a conflict of jurisdiction with the Palatine Courts; but Bristol obtained exemption as a favour to the inhabitants, and Worcester and the other Shires attempted and failed, both by legal proceedings and also by petition, to do the same. In a short Memoir[2], apparently the one on which the Queen acted in refusing this request, the question is argued very temperately, and entirely on the ground of expediency: the conclusion is that the Court should be reformed, but not restricted.

After the reformation of the Council, we hear no more of it until Lord Zouch became president. He was first sent down at the close of Elizabeth's reign, and his Commission was renewed on James's accession. In October, 1602, we casually learn[3] that "he begins to know and use his authority;" that he was slighting the Chief Justice of Chester, the permanent

including two consecutive ones, the last in 1602, revised by Coke as Attorney-General. Those of 1607 do not appear from the abstract of them to have contained, and those of 1617 certainly omitted this clause; but perhaps the thing may have been understood by the phrase, "all other good ways and means in their discretion as heretofore has been used by the Council." Rym. Fœd. Nov. 12th, 1617.

[1] Cott. MSS. Titus, B viii.

[2] Cott. MSS. Vit. C. i. undated.

[3] Harl. MSS. 5353. He is said to have thrown down the cushion laid, according to usage, for the Chief Justice of Chester beside his own, saying, "one was enough for that place."

legal member of the Council; and that "his jurisdiction is already brought in question in the Common Pleas, and the Chief Justice of that Bench"—who would be Anderson—"thinks that Gloucestershire, Herefordshire, &c. are not within his Circuit."[1]

The commencement of the dispute we are here concerned with was *Fairley's Case* in the King's Bench, reported shortly, and it seems imperfectly, by Croke, Trin. T. 2 Jac. (1604). Fairley occupied land which he claimed to hold under a lease from a deceased copyholder; the widow claimed to re-enter and avoid the lease, and she obtained an order from the Council that Fairley should "suffer her to have possession till the Court of the Manor had tried the right." Fairley was imprisoned for disobedience to this order, and thereupon sued out a writ of *Habeas Corpus cum causâ*, from the King's Bench. This writ was disobeyed by the Council "for that none of that nature had ever taken place."[2] In the paper from which I take this account it is said it was ultimately not denied by the Common Law Judges that this order "was just." For aught that appears the widow may have been in the right; but I doubt whether the Judges can have said that an order disturbing the possession until the right should be tried was a proper one to make; though they may well have admitted the King's Bench could not meddle with it on the merits, if the cause was within the jurisdiction of the Council.

The character of the King would, I suppose, have been a sufficient impediment, under any circumstances, to have prevented the question of jurisdiction from being brought in a course of legal decision up to the House of Lords[3], though

[1] I do not know of any Report of proceedings in the Common Pleas at this time, but a quarrel was on foot between the two Courts as early as 1592. 1 Anderson's Rep. 279.

[2] There was a precedent for one issuing in Lord Pembroke's time, but it is said it was not returned. S. P. O. Domestic, James I. vol. x. 86. In this account of Fairley's case I have followed the authority of a memoir in the State Paper Office, which stands next before the last cited paper. It is entitled "A view of the Differences in question betwixt the King's Bench and the Council in the Marches;" and I take it to be addressed to the Privy Council, or to Cecil, on behalf of the Welsh Council, after the discussion had proceeded some way. I concur with Mr. Spedding in thinking that it bears evident marks of having been of Bacon's drawing or settling.

[3] It may be thought that such a course would scarcely have occurred to any one in those days. But if I do not misapprehend the application of a remark made by Coke at the Council Board on June 15th 1608 (Lansd. MSS. 160.) in a discussion on the question of Prohibitions against these Provincial Courts, that "the Lords of the Upper House may determine against the Judgment of the King's Bench or Common Pleas," he contemplated or suggested such a solution: and at an earlier stage, (not later, I think, than 1606,) a memorial on behalf of the Welsh Council vehemently

that tribunal was favourably constituted for upholding the Prerogative and free from the professional bias towards the Common Law, which no doubt existed in the Courts at Westminster. It was, however, by Lord Zouch's act that the dispute was first submitted to the Privy Council and made a matter of State.

It does not appear who had been engaged in Fairley's cause while yet a private one. At this stage we find Coke, Attorney General, acting on behalf of the King's Bench, and Sir John Croke, who seems to have been officially connected with the Council of the Marches[1], and Bacon engaged for the Council. Several conferences were held between them, and there is extant what purports to be the result of these conferences[2], involving an admission of the general right and duty of the King's Bench to see that courts of this kind kept within their due limits, with stringent provisions against abuse of the writ of *Habeas Corpus;* leaving in dispute only the question of the territorial extent of the Council's jurisdiction, and even as to this suggesting a Parliamentary confirmation or extension to them of such power as the Star Chamber exercised. But either this was a mere draft by Coke and never approved by Croke and Bacon, or these latter went further in the way of conciliation than their principals were willing to follow them[3], and it was disavowed or retracted. It seems that this point of the four English shires was not present to the mind of the King's Bench when they awarded and maintained their writ; but we have seen that others had raised it long before.

Coke's account of what followed[4] is that in Michaelmas Term, 2 Jac. (1604), all the Justices and the barons of the Exchequer were assembled by command of the King, and after hearing counsel on divers days, and upon mature deliberation, resolved *una voce* that the said four counties were not within the juris-

deprecated some plan which "it was given out" the Judges had agreed upon for empanelling a jury to try the question of the four shires; whether a declaration in prohibition, or an action for false imprisonment, or what other course was intended, does not appear, but I presume there would have been some record on which error might have been brought. S. P. O. vol. x. 88.

[1] "Continual Assistant." See S. P. O. vol. xxxi. 31.; from which it appears that he resigned this office in or before 1607.

[2] Harl. MSS. 6797.

[3] See another copy in Cott. MSS. Vit. c. 1. with marginal notes retracting or nullifying the admissions, and see also S. P. O. vol. x. 87., in which the substance of these marginal notes alone appears under a heading which corresponds with that of the Harl. MS.

[4] 4 Inst. 242.

diction of the Council, and that, inasmuch as they had a limited authority, a prohibition might be granted if they proceeded in any matter beyond it: that thereupon the King ordered the Lord President's commission to be reformed; whereupon Lord Zouch resigned; and yet the commission was not afterwards reformed in all points as it ought to have been.

But this summary, though it may be substantially accurate, at all events compresses the events too much. The judges were certainly consulted, and gave an opinion unfavourable to the jurisdiction over the English shires; and the King's Bench thereupon followed up their original judgment by process against the officer who had Fairley in custody, and (it seems) against other parties, after the intemperate fashion in which it was in those days customary to vindicate authority. Some angry letters from Lord Zouch to Cecil in 1605 countenance the statement that the Privy Council at first took part against him[1]; and there is good reason to believe that, from illness and disgust combined, he thenceforth ceased from the active duties of his place, and that the authority of the Welsh Council was practically in abeyance for some time within the four shires. It also appears that some new instructions were drawn up, whether issued or not, which may be those here mentioned by Coke.[2] But Lord Zouch is spoken of as still in office in August, 1606.[3]

In the meantime, he and the Welsh Council were not inactive, and besides collecting precedents and enforcing legal arguments, pressed on the King and his advisers considerations of policy likely to prevail with them. It was in substance urged, that to give up the English shires because they were alleged not to be within the Act of Parliament, was to admit that the jurisdiction of the Court rested only on statute law; that the royal prerogative on which it had rested from the time of Edward IV., backed by the usage of four successive reigns after the Statute, went for nothing, and that the Crown had been usurping during all that time, and all the sentences and judgments given by the Council within those shires had

[1] See also a letter from Sir Herbert Croft, Dec. 19th, 1614, in which he speaks of Lord Ellesmere as having been originally against Lord Zouch.

[2] S. P. O. vol. xxxi. 31. It is a memorandum on the differences between these Instructions and the "present" ones, which latter are clearly those issued to Lord Eure in August, 1607. The two are represented as agreeing in the provisions for governing the English shires.

[3] In a letter of Carleton's of that date in S. P. O.

been *coram non judice:* that if this were so, it would go hard with the Council at York, founded by mere prerogative; and other Courts might follow. The real advantages of local and summary tribunals were not overlooked: the inconvenience of severing the resort of the inhabitants of the two sides of the Borders to the same Civil Courts was especially urged; the turbulent and Popish[1] inclination of the gentry of those parts was touched upon; and the agitation was attributed sometimes to their preference of trial by juries whom they could influence or intimidate, and to the clannish following by the common people of the gentry's lead,—sometimes to the increasing number of attorneys hungry for costs[2]: and the usual cry was raised, that any change would lead to a revolution.

Some of these considerations might, I think, not unreasonably have produced in a cautious servant of the Crown, at any time, such a feeling of hesitation as is indicated by some marginal annotations by Cecil, on one of the numerous memoirs still extant[3], which he sums up in the words, *antiquæ substructiones nec facile destruuntur, nec solæ ruunt.* But both these and other topics were, of course, dwelt on in the language and with the feelings of the times. The independence and sanctity of the royal prerogative (at least "of this kind,"[4]) were enlarged upon; as was the personal disgrace that would ensue to the King for yielding that which the Tudors had upheld: and the danger of giving a triumph to the already exorbitant and encroaching course of the Common Law Courts was enhanced by a reference to the then recent action of the Parliament of Paris.[5]

While all this was going on in Council, Parliament met; and in March, 1605-6, a bill passed the House of Commons "for explanation of the 34 and 35 Hen. VIII.," declaring the English shires to be exempt. This failed, I suppose, in the

[1] Sir H. Croft, the principal advocate for the shires, turned Papist in 1607, in the thick of the contest: *Burke's Peerage and Baronetage.* I presume this authority is conclusive on such a matter, but I have come across no contemporary allusion to the fact.

[2] It may be mentioned as a stray statistical fact that there were reckoned to be about fifty attorneys in each of three of the counties, and a number I could not decipher in the fourth.

[3] S. P. O. vol. xxxi. 35, 36. Probably early in 1608, as the Calendar places it.

[4] This qualifying phrase occurs in the Memoir first cited in this preface, and reminds one of a similar one in the *Maxims of the Law.* Reg. 19.

[5] In the same Memoir. So late as in July, 1608, Bacon seems to have in private inclined to the opinion, that in the general struggle then going on the encroachments had been more on the part of the Local Courts.—*Commentarius Solutus.*

Lords; and another bill was passing through the Commons in the following May, with the same title, when the King gave audience to some members, and made a gracious speech. The next day, on the motion of Sir Herbert Croft, the member for Herefordshire and principal promoter of the cause of the shires, the House resolved "to rest upon His Majesty's grace for the execution of the law;" and the bill was dropt.

We have no record of the terms of the King's promise on this occasion, nor can we exactly fix the order of the steps which were taken for fulfilling or breaking it. Bacon became Solicitor General in July, 1607. Seeing how, from first to last, he was employed in this affair, and the reputation he had of one that had "laboured much against the shires," there can be little doubt that he was consulted at this stage, but we are quite uncertain to what extent the influence of his advice may have prevailed. There is extant in the State Paper Office the draft of a proclamation, which Mr. Spedding informs me is in the handwriting of a person usually employed by Bacon and corrected by himself, which I should be inclined to assign to near this date. It was intended to accompany some "reformed" instructions for both the Welsh and the Northern Councils, "reduced to those limits and restrictions" which were thought fit, and to be obeyed "within the precincts of the jurisdiction of the Council as they should be set down by the said instructions." There is no further indication of what those instructions were; but the policy of this proclamation differs in one very material point from that actually pursued, inasmuch as it contemplated that the instructions, so far as they "concerned ordinary justice," should be recorded for public inspection. In other respects, its general purport was to insist on the King's resolve, neither to extend nor withdraw the prerogative of the Crown as exercised by his predecessors on any pretence of legal objections, or except "by the advice of the three Estates in Parliament," to whom the King would "always be ready to give a gracious hearing and respect." While thus distinctly basing both Councils on the ground of prerogative fortified by ancient usage, we must suppose it was intended to introduce such modifications and reforms in practice as might conciliate and extinguish the existing opposition.[1]

[1] There is in the S. P. O. vol. x. 88. a short paper written in a very moderate spirit, undated, which I incline to connect with this draft Proclamation, and to con-

No such Proclamation appears to have issued; but in August, 1607, Lord Eure was appointed President, with Instructions of which we have only an abstract.[1] It appears by the Memorandum in the State Paper Office, already referred to, that Coke was one of the Board of Council who attended their drawing up; but we do not know what part he took further than procuring an increase to the salary of the Chief Justice of Chester.

In these Instructions the extraordinary criminal powers of the Council were confined to Wales, and a mere Commission of Oyer and Terminer, and directions to keep four general terms in the year, were given for the four shires. Then, with a recital that a question had been made by divers inhabitants whether the four Counties and their Cities were part of the Marches, "in respect of long practice used by the President and Council there, and for ease of the poorer sort in these remote places, not fit to be compelled to come to Westminster for petty causes," power was given to hear and determine all matters of debt and trespass where the damage was laid under 10*l.* Fines were to be levied as heretofore, but if any could not be levied in the four Counties, they were to be estreated into the Exchequer.

A less concession than this might have been satisfactory, perhaps, in a Parliamentary settlement, as the passions of the House of Commons seem never to have been engaged in the controversy. But when the proceedings in the Commons were stayed in reliance on the King's "execution of the Law," it was fully understood that the Judges had declared the Law to be with the Shires, and that any civil jurisdiction, or any powers beyond those of a Commission of Oyer and Terminer, were illegal. To submit, therefore, even to the limited 10*l.* juris-

sider as substantially embodying Bacon's advice to his clients and to Salisbury. It insists on usage and precedents as proving that the four shires were included in the Marches: it urges that the Common Law Judges are not bound by their oath to issue Prohibitions to other Courts where there are reasons of State or of convenience against it: it insists on the utility of the Welch Council, and alleges that though the Statute allows it to judge of matters of inheritance, yet the King's Instructions do not: and it rather suggests than insists that, besides the Statutory power, the Crown has an inherent right and duty to see to the "Provincial and equal distribution" of Courts of Justice: and it ends with proposing, "for the determining of all the controversy" that the King should grant a commission for these Shires "such as he granteth for York, and as former Kings granted for Wales and the Marches before the statute was made" as to which see note in p. 570.

[1] Cotton MSS. Vitell. c. i.

diction was, in principle, to give up the strength of their case, and to render illegitimate all remonstrance against any subsequent encroachment of the Crown, until (as in fact happened) the whole obnoxious authority of the Council might be restored.

Besides this Constitutional ground of opposition, which was the one mainly insisted on, and the apparent breach of faith on the part of the King, there were causes enough of irritation in the conduct of the matter by the Privy Council and Lord Eure, although the latter asserts, (what his opponents contradicted, and what I cannot either confirm or deny,) that his administration was free from such harshness and arrogance as had provoked hostility towards his predecessor.

Sir Herbert Croft was put out of the Commission of Lieutenancy and of the Peace, not, it is said, without much difference of opinion in the Privy Council[1]; and Lord Eure attributes his subsequent opposition to vexation at this slight. The terms of the new Instructions were, as usual, kept private[2]; and Lord Eure when questioned on the subject seems to have been purposely ambiguous. By his own account he "answered that his Majesty had not exempted the four English Shires from the sole jurisdiction of this Court," and promised "judicial sentence of such causes as by Instructions we should admit;" and by way of comment on this information, a complaint being made about the conduct of a magistrate (and therefore not within their jurisdiction) in a matter concerning a tenant of Sir H. Croft, the Council called the parties before them, and, apparently without disclosing that in fact they had no power, got them to submit to some course of arbitration. Sir Herbert took up the case and obtained a Prohibition.

The result of all this was, that before Christmas a sturdy resistance was organised against the Council: in Herefordshire, the Bishop and twenty-six of the principal gentry joined in

[1] Carleton, Sept. 16th, calls it "out of the Commission of the Council of Wales," which I suppose is a loose expression. I take the fact from Lord Eure and official returns. It is possible it was as Papist, and not in consequence of his Parliamentary conduct, that he was thus disgraced. But Sir Roger Owen, who according to Carleton was at the same time displaced, was also a prominent advocate on the same side. See Parliamentary debates, and Sir H. Croft's letter to Somerset, Dec. 19th, 1614.

[2] Bacon's Proclamation proves the custom, and Lord Eure's own letter, Feb. 6th, 1607-8, shows it had not been departed from. I have no doubt the contents of the Instructions became known in the course of time — perhaps by letters from the Privy Council to the Sheriffs, enforcing obedience, suggested by Lord Eure in Feb. 1607-8, and apparently written in the following August. See Eure's letter of Aug. 7th.

urging Sir H. Croft to continue his exertions to free them; and in Worcestershire the Sheriff, Sir John Packington, a veteran courtier of Elizabeth's time, supported his under-sheriff in refusing to obey the precepts of the Court. Lord Eure wrote more than once to Salisbury describing the untenable position in which he was placed, and urging that the powers of the Council in the English Shires should either be raised to something like what they had been, or else altogether given up, and tendered his own resignation if his request were set aside.

It was determined that the question should be taken up by the Privy Council. In April, 1608, the Chief Justice of Chester proceeded to London with records tending to make out the jurisdiction of the Council, and Lord Eure was in readiness to follow when required. The more general question—the first one that had been mooted in Fairley's case—of the right and duty of the King's Bench to issue Prohibitions to other courts, and its extent, was assuming importance, and the "cause of the four Shires," that of the Council of York, and this general question came to be considered together. Bacon, as Solicitor General, was of course concerned in the matter; but up to July he seems to have had no confidential communication of the King's views, to have thought a Parliamentary settlement desirable, but to have guessed that the dignity of the Prince of Wales would be thought at Court to be affected if the Welch Council should have its territorial limits restricted.[1]

It was out of a decision taken at a meeting of the Privy Council on Nov. 6th, that the arguments here reported arose. The King propounded the question, "whether the article of the Instructions touching hearing causes within the four shires under 10*l.* be agreeable to the law." Coke, now Chief Justice of the Common Pleas and the mouthpiece of the Judges, asked for time and the opportunity of hearing counsel before giving an answer. A somewhat indecorous altercation followed between him and the King; and ultimately it was settled this question, and, it would seem, some other ones touching both Councils, should be argued before the Judges; that the Presidents of Wales and York should instruct their own counsel; and "the King's own counsel should inform the Judges of his desires;" and the Judges were to "hear what any could say

[1] *Commentarius Solutus qu. supr.* The King did think in 1614 that the matter concerned the Prince.

against the same, and to return their report what they had heard on both sides, and leave the judgment to the King."[1]

The matter was argued for six days, of which four were taken up by the counsel for the Crown and the Council. I suppose that the extent of the prerogative was not considered to be referred to the Judges, or else it was disposed of before the arguments we have were commenced; and probably no one will now take an interest in the mere question of the legal interpretation of the statute, checked or assisted by the evidence of anterior and contemporary usage: if any do, he will find other arguments on each side in the Cotton MSS. and the State Paper Office. I do not profess to have studied these documents very closely; but the case seems to me very arguable on both sides as the matter then stood: and perhaps the Subsidy Act already referred to, to which I believe no allusion occurs, gives equal handle to either side. It speaks of the Council as established "in the Marches of Wales and the Shires thereunto adjoining." This was after the destruction of the Lordships Marchers of which Bacon makes so much: it therefore helps those who contend that "the Marches" had still their old meaning and were distinguished from the Counties. But then it shews that at the time when it was enacted that the Council should "be and remain as heretofore hath been used," that Council with some kind of jurisdiction extended over the adjoining shires: and it leaves it unexplained why those Shires and that Jurisdiction are not mentioned at all in the later Statute. What appears to me most striking, both here and in the argument on the Writ *Rege Inconsulto*, is the ease with which Bacon throws off the tone of the Minister of State and the courtier when he comes to argue before Common Law Judges. It was not a common accomplishment in those days.

The opinion of the Judges was delivered in writing by Coke on Feb. 3rd, 1608-9. Its substance was never published; though pressed for in Parliament.[2] We may therefore infer that it was not favourable to the Crown; and Sir H. Croft was probably well informed when in a letter to Somerset intended for the King's eye[3] he says it was generally under-

[1] Lansdowne MSS. 160.

[2] See Petition of Grievances, printed in State Trials, vol. ii. p. 519., from Petyt's *Jus Parliamentarium*.

[3] S. P. O. vol. lxxvi. 53. early in 1614.

stood they reported that "not disputing H. M's. regal power, in mere points of law those four English counties ought not to be under that Government."

The King noted upon this, "I have followed the Judges' advice in this business:" but he does not particularise how and when, and the assertion, to whatever time referred, can, I think, only rest upon some quibble. On this occasion the Judges were expressly confined to the dry legal question; nor can I find a trace of anything at all having been done thereupon, unless perhaps to give some fresh coercive power to the Welch Council.[1]

If this last surmise be well founded, it may account for the lull which seems to have followed for the rest of the year 1609, if one may judge from the absence of any complaints in the State Paper Office by Lord Eure. But before the meeting of Parliament in 1610 we find the agitation in full vigour, and so far was the King from shewing any reliance on the conformity of his instructions with the opinion of the Judges, that the Chancellor's powers were called in aid of State policy to stay by Injunction the numerous actions for False Imprisonment and motions for Prohibitions to which the malcontents resorted for the purpose of trying the right.

In Parliament the grievances of the four Shires were again brought forward[2] and supported by the House at large; but not so earnestly as to risk for their sake the success of the great bargain then under discussion. Nevertheless the King found it expedient once more to stop legislation on the subject by another promise, viz. that "he would after Midsummer then next give leave to any man to try the right."[3] The main business of the Session came to nothing, and Parliament closed

[1] We have already seen that Lord Eure pressed for greater powers as absolutely necessary if he was to hold his ground. Now in Cott. MSS. Vitell. c. i. p. 192. there is a paper which I take to be written after the close of the Session of 1610, in which it is said that "the Instructions that are now are of larger extent than those which were sent down about 3 years since, upon the first complaint." It is possible, but in my opinion very improbable, that the allusion may be to the instructions preceding those to Lord Eure, if they were ever issued.

[2] Sir H. Croft suggested they might submit to the Prince of Wales as President. H. C. Journ.

[3] In 1614 Sir H. Croft alleged this promise and the breach of it by continued Injunctions, in a letter to Somerset S. P. O. vol. lxxvi. 53. I. The King notes on it "conditional:"—I suppose on the great bargain being brought to a successful issue. In the House, the letter to the Speaker containing the promise was called for; the Master of the Rolls, in whose custody it had been placed, professed to have lost it, but acknowledged it was to the effect stated by Sir H. Croft, who had a copy of it. H. C. J. May 20th and 31st, 1614.

with a speech of the King only promising enquiry and not holding out much prospect of yielding in this matter, but engaging never to erect any other such Court[1] but by Act of Parliament.

The struggle was continued out of doors. A Grand Jury presented the Council as a nuisance; 5000 signatures were subscribed to some declaration to the like effect[2]; the process of the Council was set at nought, and actions brought or threatened. On the other hand, Lord Eure represents all this turmoil as the factitious result of the exertions of a small body of discontented men, and invited investigation by an impartial commissioner, and he gave figures to shew the popularity of the Council as a Small Debts Court.[3]

Parliament met again in 1614. Sir H. Croft, who was one of those denounced as "undertakers," had endeavoured, before the Session commenced, to gain the ear of Somerset, the new favourite, and win over the King, if not to give up the jurisdiction, at least to keep his promise and let the question come fairly before the Courts at Westminster. In letters already referred to, he went over the whole ground. He professed himself a friend to any general measure for establishing Civil Courts in remote counties, but resented the imputation that the gentry of the four Shires specially needed such a check on their oppressive disposition[4]; and he pointed out that the existing state of things, in which as plaintiffs they could choose their own tribunal, was not effectual for the purpose. He made sundry charges (of venality among others) against the Council, and finally proposed to "answer any objections in His Majesty's presence, that himself may be the judge," which he did "not impugning the extraordinary abilities of those (if he mistook not) that were the chief oppugners:" of whom I presume Bacon was one. The King in a marginal note accepted this challenge, with as large an audience as Sir Herbert might wish, and no doubt would have much enjoyed the passage of wits. However, I find no trace of its having taken place. On

[1] Carte, Hist. Eng. vol. iii. 794. But I think I have seen somewhere a denial by the King that his speech was so explicit on this point.

[2] S. P. O. vol. lvii. 96. lviii. 56. Cott. MSS. *qu. supr.*

[3] The causes tried in the four shires increased from 1350 in 1608–9 to 3376 in the following year; and he remarks that the plaintiffs had the option of going to Westminster if they pleased.

[4] Some measure of the sort was brought under the consideration of Parliament when it met. House of Commons Journal, May 18th.

the opening of Parliament it appeared that among the conciliatory measures intended to be proposed by the King, a release of the four Shires was not included[1]; and Sir H. Croft soon found himself personally slighted by the King for persevering in the cause, while he was looked on coldly by his friends in Parliament as a time-server.[2] He then changed his plan, and with the concurrence of his constituents endeavoured to procure as a grace that which they had hitherto demanded as a right. In point of form, the mere issue of new instructions omitting the English shires would have left the Crown at liberty to re-include them at another time; and so, unless the conjecture be accepted that some of the criminal or censorial powers had been renewed since 1607, nothing might seem to be gained by such a concession but the relinquishment of the ten pounds civil jurisdiction and the removal of the bodily presence of the Council, which seems to have involved some charges in the nature of purveyance on the counties or municipalities. But it was no doubt felt that, the Council once totally withdrawn, they were practically safe from seeing it regain a footing; and on the other hand not only Somerset, whom Sir Herbert seems to have considered friendly to him all along, but Bacon himself, then Attorney General, and Lord Sheffield, President of the Northern Council, were favourable to such an arrangement, as yielding no principle and as "rather a mean to take away much occasion of questioning" the jurisdiction of that other Council.[3] The request was not complied with, and the matter was kept before Parliament up to the last day of the short session, with the incident about the King's lost letter already mentioned.

On December 19th of the same year Sir H. Croft made his last appeal, so far as appears, to the King through Somerset, still vouching Bacon and Lord Sheffield, and adding the Lord Treasurer's name, as also favourable. After so many failures one need not seek for any special cause why this effort also came to nothing. But some marginal annotations lead to the

[1] A Bill was proposed and passed for the repeal of a clause in 34 Henry VIII., which, if it did not expire with Henry's life, made Wales subject to Crown legislation. I do not know what part the Welch gentry had taken hitherto in the agitation, but there are passages in some of the memoirs shewing that it was, at any rate, sought to alarm them about this clause, which the advocates of the Council treated as obsolete.

[2] See letter to Somerset of May 9th, 1614. S. P. O.

[3] Letter of May 9th, already cited. He there speaks of a paper he had already sent for the King's perusal, which I think may be the memorial of the inhabitants of Herefordshire inserted in the Calendar as of June, vol. lxxvi. 55, 56.

inference that Somerset's loss of favour made any step he may have taken ineffectual.[1]

We here lose all trace, so far as I know, of this agitation. Sir Herbert himself died in 1622 abroad, having previously — but how long before is not stated — entered a religious house.[2] In this letter he speaks of his principal fellow-labourers in the cause, Sir Edward Wintorn, Sir Samuel Sandys, and Sir Roger Owen, as disabled like himself from then attending to it. And there is no difficulty in understanding how such an agitation might flag or be altogether abandoned after ten years of failure,—more especially as of sixty names attached to a letter to Somerset thanking him for his favour to the cause, which seems to have shortly preceded the last of Sir Herbert's, all but one of those which I have found to be historical seem to belong to the Royalist party in the ensuing struggle.[3]

In 1617, when Bacon was Chancellor, Lord Compton succeeded Lord Eure, and the new Instructions made no distinction between Wales and the English counties. In both, civil jurisdiction limited to 50*l.* concurrent with the Common Law Courts was given in purely personal actions, which was extended to claims of any amount when the poverty or inability of the plaintiff was duly certified, together with a full equitable and Star Chamber jurisdiction, saving that Injunctions were not to issue against proceedings in the Superior Courts. All the great officers of the State and many Peers, the Bishops of the included dioceses, and several Puisne Judges, were nominally members of the Council, which I believe was an innovation; but the only legal member of the *Quorum* was, as of old, the Chief Justice of Chester, the others being plain knights or gentlemen. Some details as to process and the charge upon the counties for cartage and fuel seem to have been amended; but otherwise the old precedents were generally followed, and the salaries

[1] One John Mills fills a blank space in this letter with sundry texts, of which I only noted one: "Is it because there is no God in Israel that thou suest to Baalzebub?"

[2] Burke's Peerage and Baronetage.

[3] I speak only from a cursory examination of Burke and of the list of the members of the Long Parliament; and I do not answer for the identity of the individuals in all cases. One name is Chute, which is that of a member who was committed for his conduct in the Parliament of 1614. Those which seem to be royalist names are Croft, Packington, Hopton, Sheldon, Sandys, Lee, Corbet. The others — the sixty being made up by several of one name signing — are, Bodenham, Coningsby, Scudamore, Baskerville, Vaughan, Hyett, Blount, Tomkins, Kyrle, Barkeley, Edgwick, Pytt, Ketelbye, Dingley, Savage, Brace, Ingram, Moore, Atwood, Jeffreys, Kinaston, Owen, Hayward, Leighton, Briggs, Milton, Ottley, Newton, Chambers, Edwards, Kery, and Norton.

remained charged on the fines: all the clauses concerning the peace and the administration of justice (nearly the whole document) were to be enrolled in Chancery and to be periodically read in open court.[1]

Some names among the councillors not of the *Quorum* are the same as are subscribed to the letter to Somerset, which may be thought to be evidence of at least an intention to conciliate, and there is nothing to shew it was not successful. In the next reign, as every one knows, the great attack was made on the kindred Council of the North; but the legislation which ensued, after abolishing the Star Chamber itself, took away all similar jurisdiction from the Welch Council and all other courts, leaving untouched, if I rightly read it, any question about the civil jurisdiction. Finally, the statute 1 W. & M. c. 27. altogether repealed 34 H. 8. c. 26. and abolished the Council.

[1] Rymer, Fœd. Nov. 12th, 1617.

THE

JURISDICTION OF THE MARCHES.

The effect of the first argument of the King's Solicitor-General, in maintaining the jurisdiction of the Council of the Marches over the four shires.

THE question for the present is only upon the statute of 34 H. VIII. and though it be a great question, yet it is contracted into small room; for it is but a true construction of a monosyllable, the word *marches*.

The exposition of all words resteth upon three proofs; the propriety of the word, and matter precedent and subsequent.

Matter precedent concerning the intent of those that speak the words, and matter subsequent touching the conceit and understanding of those that construe and receive them.

First, therefore, as to *vis termini*, the force and propriety of the word; this word *marches* signifieth no more but limits, or confines, or borders, in Latin *limites*, or *confinia*, or *contermina;* and thereof was derived at the first *Marchio*, a Marquess, which was *comes limitaneus*.

Now these limits cannot be *linea imaginaria*, but it must have some contents and dimension, and that can be no other but the counties adjacent; and for this construction we need not wander out of our own state, for we see the counties of Northumberland, Cumberland, and Westmoreland lately the borders upon Scotland: now the middle shires were commonly called the east, west, and middle marches.

To proceed therefore to the intention of those that made the statute, in the use of this word, I shall prove that the parliament took it in this sense by three several arguments.

The first is, that otherwise the word should be idle; and it is a rule, *verba sunt accipienda, ut sortientur effectum*. For this word *marches*, as is confessed on the other side, must be either

for the counties marches, which is our sense, or the lordships marchers, which is theirs; that is, such lordships as by reason of the incursions and infestation of the Welsh in ancient time, were not under the constant possession of either dominion, but like the batáble ground where the war played. Now if this latter sense be destroyed, then all equivocation ceaseth.

That it is destroyed appears manifestly by the statute of 27 H. VIII. made seven years before the statute of which we dispute. For by that statute all the lordships marchers are made shire ground, being either annexed to the ancient counties of Wales, or to the ancient counties of England, or erected into new counties, and made parcel of the dominion of Wales; and so no more marches after the statute of 27°. So as there were no marches in that sense at the time of the making of the statute of 34.

The second argument is from the comparing of the place of the statute, whereupon our doubt riseth, *viz.* that there shall be and remain a Lord President and council in the dominion of Wales and the marches of the same, &c. with another place of the same statute, where the word *marches* is left out. For the rule is, *opposita juxta se posita magis elucescunt.* There is a clause in the statute which gives power and authority to the King to make and alter laws for the weal of his subjects of his dominion of Wales: there the word *marches* is omitted, because it was not thought reasonable to invest the King with a power to alter the laws, which is the subjects' birthright, in any part of the realm of England; and therefore, by the omission of the word *marches* in that place, you may manifestly collect the signification of the word in the other, that is, to be meant of the four counties of England.

The third argument which we will use is this: the Council of the marches was not erected by the Act of Parliament, but confirmed; for there was a president and council long before in E. IV.'s time, by matter yet appearing, and it is evident upon the statute itself, that in the very clause which we now handle it referreth twice to the usage, *as heretofore hath been used.*

This then I infer, that whatsoever was the King's intention in the first erection of this court was likewise the intention of the Parliament in the establishing thereof, because the Parliament builded but upon an old foundation.

The King's intention appeareth to have had three branches,

whereof every of them doth manifestly comprehend the four shires.

The first was the better to bridle the subject of Wales, which at that time was not reclaimed; and therefore it was necessary for the president and council there to have jurisdiction and command over the English shires, because that by the aid of them which were undoubted good subjects, they might the better govern and suppress those that were doubtful subjects.

And if it be said, that it is true that the four shires were comprehended in the commission of *oyer* and *terminer*, for the suppressing of riots and misdemeanors, but not for the jurisdiction of a court of equity; to that I answer, that their[1] commission of oyer and terminer was but *gladius in vagina*, for it was not put in practice amongst them; for even in punishment of riots and misdemeanors they proceed not by their commission of oyer and terminer by way of jury, but as a council by way of examination. And again it was necessary to strengthen that court for their better countenance with both jurisdictions, as well civil as[2] criminal, for *gladius gladium juvat*.

The second branch of the King's intention was to make a better equality of commerce and intercourse in contracts and dealings between the subjects of Wales and the subjects of England: and this of necessity must comprehend the four shires; for otherwise, if the subject of England had been wronged by the Welsh on the side of Wales, he might take his remedy nearer hand; but if the subject of Wales, for whose weal and benefit the statute was chiefly made, had been wronged by the English in any of the shires, he mought[3] have sought his remedy at Westminster.

The third branch of the King's intent was to make a convenient dignity and state of the mansion and resiance of his eldest son, when he should be created Prince of Wales: which likewise must plainly include the four shires; for otherwise to have sent *primogenitum Regis* to a government, which without the mixture of the four shires (as things then were) had more peril than honour or command, or to have granted him only a power of lieutenancy in those shires where he was to keep his state, not adorned with some authority civil, had not been convenient.

[1] "There" in MS.

[2] Originally "as civil and criminal," in MS. Bacon inserted "well," but left the "and" uncorrected.

[3] So in MS. both here and above. I have retained the spelling in this place, because it is evidently the old past tense of "must," now lost to us.

So that here I conclude the second part of that I am to say touching the intention of the parliament precedent.

Now touching the construction subsequent, the rule is good, *optimus legum interpres consuetudo;* for our labour is not to maintain an usage against a statute, but by an usage to expound a statute; for no man will say but the word *marches* will bear the sense that we give it.

This usage or custom is fortified by four notable circumstances: first, that it is ancient, and not late, or recent; secondly, it is authorised, and not popular, or vulgar; thirdly, that it hath been admitted and quiet, and not litigious, or interrupted; and fourthly, when it was brought in question, which was but once, it hath been affirmed *judicio controverso.*

For the first, there is record of a president and council that hath exercised and practised jurisdiction in these shires, as well sixty years before the statute, *viz.* since 18 E. IV. as the like number of years since; so that it is *Janus bifrons,* it hath a face backward from the statute as well as forwards.

For the second, it hath received these allowances: by the practice of that court by suits originally commenced there; by remanding from the courts of Westminster when causes within those shires have been commenced here above, sometimes in Chancery, sometimes in the Star-Chamber; by the admittance of divers great learned men and great judges, that have been of that council and exercised that jurisdiction, as at one time Bromley, Morgan, and Brook, being the two chief justices and chief baron, and divers others; by the King's learned counsel, which always were called to the penning of the King's Instructions; and lastly by the King's Instructions themselves, which though they be not always extant, yet it is manifest that since 17 H. VIII. when Princess Mary went down, the four shires were ever comprehended in the Instructions, either by name, or by that that amounts to so much. So as it appears that this usage or practice hath not been an obscure custom practised by the multitude, which is many times erroneous, but authorised by the judgment and consent of the state: for as it is *vera vox* to say, *maximus erroris populus magister,* so it is *dura vox* to say, *maximus erroris Princeps magister.*

For the third, it was never brought in question till 16 Eliz. in the case of one Winde.

And for the fourth, the controversy being moved in that

case, it was referred to Gerrard, Attorney, and Bromley, Solicitor, who was afterwards chancellor of England, and had his whole state of living in Shropshire and Worcester, and by them reported to the lords of the council in the Star Chamber, and upon their report decreed, and the jurisdiction affirmed.

Lastly, I will conclude with two manifest badges and tokens, though but external yet violent in demonstration, that these four shires were understood by the word *marches;* the one the denomination of that council, which was ever in common appellation termed and styled *the council of the marches,* or in the marches, rather than the council of Wales, or in Wales; and *denominatio est a digniore.* If it had been intended of lordships marches, it had been as if one should have called my lord mayor, my lord mayor of the suburbs. But it was plainly intended of the four English shires, which indeed were the more worthy.

And the other is of the perpetual resiance and mansion of the council, which was evermore in the shires: and to imagine that a court should not have jurisdiction where it sits, is a thing utterly improbable, for they should be *tanquam piscis in arido.*

So as upon the whole matter I conclude that the word *marches* in that place, by the natural sense and true intent of the statute, is meant of the four shires.

The effect of that, that was spoken by Sergeant Hutton *and Serjeant* Harris, *in answer of the former argument, and for the excluding of the jurisdiction of the marches in the four shires.*

That which they both did deliver was reduced to three heads.

The first, to prove the use of the word *marches* for lordships marchers.

The second to prove the continuance of that use of the word after the statute of 27°, that made the lordships marchers shire grounds; whereupon it was inferred, that though the marches were destroyed in nature, yet they remained in name.

The third was some collections they made upon the statute of 34, whereby they inferred that that statute intended that word in that signification.

For the first, they did allege divers statutes before 27 H. VIII. and divers book cases of law in print, and divers offices and records, wherein the word *marches* of Wales was understood of the lordships marchers.

They said farther and concluded that, whereas we show our sense of the word but rare, they show theirs common and frequent; and whereas we show it but in a vulgar use and acceptation, they show theirs in a legal use in statutes, authorities of books, and ancient records.

They said farther, that the example we brought of marches upon Scotland was not like but rather contrary; for they were never called marches of Scotland, but the marches of England: whereas the statute of 34 doth not speak of the marches of England, but of the marches of Wales.

They said farther, that the county of Worcester did in no place or point touch upon Wales, and therefore that county could not be termed *marches*.

To the second they produced three proofs; first some words in the statute of 32 H. VIII. where the statute, providing for a form of trial for treason committed in Wales and the marches thereof, doth use that word; which was in time after the statute of 27, whereby they prove the use of the word continued.

The second proof was out of two places of the statute whereupon we dispute, where the word *marches* is used for the lordships marchers.

The third proof was the style and form of the commission of *oyer* and *terminer* even to this day, which run to give power and authority to the president and council there, *infra principalitat. Walliæ*, and *infra* the four counties by name, with this clause farther *et marchias Walliæ eisdem comitatibus adjacent'*: whereby they infer two things strongly, the one that the marches of Wales must needs be a distinct thing from the four counties; the other that the word *marches* was used for the lordships marchers long after both statutes.

They said farther, that otherwise the proceeding which had been in the four new erected counties of Wales by the commission of *oyer* and *terminer*, by force whereof many had been proceeded with both for life and other ways, should be called in question, as *coram non judice*, insomuch as they neither were part of the Principality of Wales, nor part of the four shires,

and therefore must be contained by the word *marches*, or not at all.

For the third head, they did insist upon the statute of 34, and upon the preamble of the same statute, the title being *an act for certain ordinances in the King's majesty's dominion and principality of Wales*, and the preamble being *for the tender zeal and affection that the King bears to his subjects of Wales;* and again, *at the humble suit and petition of his subjects of Wales.* Whereby they infer that the statute had no purpose to extend, or intermeddle with any part of the King's dominions or subjects, but only within Wales.

And for usage and practice, they said it was nothing against an act of parliament.

And for the instructions, they pressed to see the instructions immediately after the statute made.

And for the certificate and opinions of Gerrard and Bromley, they said they doubted not, but that if it were now referred to the Attorney and Solicitor, they would certify as they did.

And lastly, they relied, as upon their principal strength, upon the precedent of that which was done of the exempting of Cheshire from the late jurisdiction of the said council; for they said, that from 34 of H. VIII. until 11 of Queen Eliz. the Court of the Marches did usurp jurisdiction upon that county, being likewise adjacent to Wales as the other four are; but that in the eleventh year of Queen Elizabeth aforesaid, the same, being questioned at the suit of one Radforde, was referred to the Lord Dyer and three other judges, who by their certificate at large remaining of record in the chancery did pronounce the said shire to be exempted, and that in the conclusion of their certificate they gave this reason; because it was no part of the principality or marches of Wales. By which reason, they say, it should appear their opinion was, that the word *marches* could not extend to counties adjacent. This was the substance of their defence.

The reply of the King's solicitor to the arguments of the two serjeants.

Having divided the substance of their arguments *ut supra*, he did pursue the same division in his reply, observing nevertheless both a great redundancy and a great defect in that which was spoken. For touching the use of the word *marches*

great labour had been taken, which was not denied: but touching the intent of the parliament, and the reasons to demonstrate the same, which were the life of the question, little or nothing had been spoken.

And therefore, as to the first head, that the word *marches* had been often applied to the lordships marchers, he said it was the sophism which is called *sciomachia*, fighting with their shadows; and that the sound of so many statutes, so many printed book cases, so many records, were *nomina magna*, but they did not press the question. For we grant that the word *marches* hath significations sometimes for the counties, sometimes for the lordships marchers, like as Northampton and Warwick are sometimes taken for the towns of Northampton and Warwick, and sometimes for the counties of Northampton and Warwick. And Dale and Sale are sometimes taken for the vills or hamlets of Dale and Sale, and sometimes taken for the parishes of Dale and Sale: and therefore that the most part of that they had said went not to the point.

To that answer which was given to the example of the middle shires upon Scotland, it was said, it was not *ad idem;* for we used it to prove that the word *marches* may and doth refer to whole counties, and so much it doth manifestly prove, neither can they deny it. But then they pinch upon the addition; because the English counties adjacent upon Scotland are called the marches of England, and the English counties adjacent upon Wales are called the marches of Wales. Which is but a difference in phrase: for sometimes limits and borders have their names of the inward country, and sometimes of the outward country. For the distinction of *exclusivè* and *inclusivè* is a distinction both in time and place; as we see that that, which we call this day fortnight, excluding the day, the French and the law-phrase calls this day fifteen days, or *quindena*, including the day. And if they had been called the marches upon Wales or the marches against Wales, then it had been clear and plain; and what difference between the banks of the sea and the banks against the sea? So that he took this to be but a toy or cavillation, for that phrases of speech are *ad placitum, et recipiunt casum.*

As to the reason of the map, that the county of Worcester doth no way touch upon Wales; it is true, and I do find

when the lordships marchers were annexed, some were laid to every other of the three shires, but none to Worcester. And no doubt but this emboldened Winde to make the claim to Worcester, which he durst not have thought on for any of the other three. But it falls out well that that which is the weakest in probability is strongest in proof; for there is a case ruled in that more than in the rest. But the true reason is, that usage must overrule propriety of speech; and therefore if all commissions, and instructions, and practices, have coupled these four shires, it is not the map that will sever them.

To the second head he gave this answer. First, he observed in general that they had not showed one statute, or one book case, or one record (the commissions of oyer and terminer only excepted) wherein the word *marches* was used for lordships marchers since the statute of 34. So that it is evident, that as they granted the nature of those marches was destroyed and extinct by 27; so the name was discontinued soon after, and did but remain a very small while, like the sound of a bell, after it hath been rung; and as indeed it is usual when names are altered, that the old name which is expired will continue for a small time.

Secondly, he said that whereas they had made the comparison, that our acceptation of the word was popular, and theirs was legal, because it was extant in book cases, and statutes, and records; they must needs confess that they are beaten from that hold: for the name ceased to be legal clearly by the law of 27, which made the alteration in the thing itself, whereof the name is but a shadow; and if the name did remain afterwards, then it was neither legal nor so much as vulgar, but it was only by abuse, and by a *trope* or *catachresis*.

Thirdly, he showed the impossibility how that signification should continue, and be intended by the statute of 34. For if it did, it must be in one of these two senses, either that it was meant of the lordships marchers made part of Wales or of the lordships marchers annexed to the four shires of England.

For the first of these, it is plainly impugned by the statute itself: for the first clause of the statute doth set forth that the principality and dominion of Wales shall consist of twelve shires; wherein the four new erected counties which were formerly lordships marchers, and whatsoever else was lordships marchers annexed to the ancient counties of Wales, is compre-

hended; so that of necessity all that territory or border must be Wales: then followeth the clause immediately, whereupon we now differ, *viz.* that there shall be and remain a president and council in the principality of Wales and the marches of the same. So that the parliament could not forget so soon what they had said in the clause next before: and therefore by the marches they meant somewhat else besides that which was Wales. Then if they fly to the second signification, and say that it was meant by [1] the lordships marchers annexed to the four English shires; that device is merely *nuper nata oratio*, a mere fiction and invention of wit, crossed by the whole stream and current of practice; for if that were so, the jurisdiction of the council should be over part of those shires, and in part not; and then in the suits commenced against any of the inhabitants of the four shires, it ought to have been laid or showed that they dwelt within the ancient lordships marchers, whereof there is no shadow that can be showed.

Then he proceeded to the three particulars. And for the statute of 32, for trial of treason, he said it was necessary that the word *marches* should be added to Wales, for which he gave this reason: that the statute did not only extend to the trial of treasons which should be committed after the statute, but did also look back to treasons committed before: and therefore this statute being made five years after the statute of 27 that extinguished the lordships marchers, and looking back as was said, was fit to be penned with words that might include the preterperfect tense as well as the present tense; for if it had rested only upon the word *Wales*, then a treason committed before the lordships marchers were made part of Wales might have escaped the law.

To this also another answer was given; which was that [as] [2] the word *marches* was used in that statute, it could not be referred to the four shires, because of the words following, wherewith it is coupled, *viz.* in Wales, and the marches of the same, where the King's writ runs not.

To the two places of the statute of 34 itself, wherein the word *marches* is used for lordships marchers, if they be diligently marked, it is merely sophistry to allege them. For both of them do speak by way of recital of the time past before the

[1] So in MS. *quære* of?

[2] I have inserted this word, which is not in the MS., to make a grammatical sentence. But I do not myself see the bearing of the argument.

statute of 27, as the words themselves being read over will show without any other enforcement. So that this is still to use the almanack of the old year with the new.

To the commissions of oyer and terminer, which seemeth to be the best evidence they show for the continuance of the name in that *tropical* or abused sense, it might move somewhat, if that form of penning those commissions had been begun since the statute of 27. But we show forth the commission in 17 H. VIII. when the Princess Mary went down, running in the same manner *verbatim;* and in that time it was proper, and could not otherwise be. So that it appeareth that it was but merely a *fac simile,* and that notwithstanding the case was altered yet the clerk of the crown pursued the former precedent; hurt it did none, for the word *marches* is there superfluous.

And whereas it was said that the words in those commissions were effectual, because else the proceedings in the four new erected shires of Wales should be *coram non judice,* that objection carrieth no colour at all; for it is plain, they have authority by the word *Principality* of Wales, without adding the word *marches*; and that is proved by a number of places in the statute of 34 where if the word *Wales* should not comprehend those shires, they should be excluded in effect of the whole benefit of that statute; for the word *marches* is never added in any of these places.

To the third head touching the true intent of the statute, he first noted how naked their proof was in that kind which was the life of the question; for all the rest was but *in litera, et in cortice.*

He observed also that all the strength of our proof that concerned that point they had passed over in silence, as belike not able to answer. For they had said nothing to the first intentions of the erections of the court, whereupon the parliament built; nothing to the diversity of penning which was observed in the statute of 34 leaving out the word *marches,* and resting upon the word *Wales* alone; nothing to the resiance; nothing to the denomination; nothing to the continual practice before the statute and after; nothing to the King's instructions, &c.

As for that that they gather out of the title and preamble, that the statute was made for Wales, and for the weal and

government of Wales, and at the petition of the subjects of Wales, it was little to the purpose: for no man will affirm on our part the four English shires were brought under the jurisdiction of that council, either first by the King or after by the parliament, for their own sakes, being in parts no farther remote; but it was for congruity's sake, and for the good of Wales, that that commixture was requisite. And *turpis est pars, quæ non congruit cum toto.* And therefore there was no reason that the statute should be made at their petition, considering they were not *primi in intentione* but came *ex consequenti.*

And whereas they say that usage is nothing against an act of parliament, it seems they do voluntarily mistake when they cannot answer. For we do not bring usage to cross an act of parliament where it is clear, but to expound an act of parliament where it is doubtful. And evermore *contemporanea interpretatio,* whether it be of statute, or Scripture, or author whatsoever, is of greatest credit. For to come now above sixty years after by subtilty of wit to expound a statute otherwise than the ages immediately succeeding did conceive it, is *expositio contentiosa,* and not *naturalis.* And whereas they extenuate the opinion of the Attorney and Solicitor, it is not so easy to do; for first they were famous men, and one of them had his patrimony in the shires; secondly it was of such weight, as a decree of the council was grounded upon it; and thirdly it was not unlike, but that they had conferred with the judges, as the Attorney and Solicitor do often use in like cases.

Lastly for the exemption of Cheshire he gave this answer. First that the certificate in the whole body of it, till within three or four of the last lines, doth rely wholly upon that reason, because it was a county Palatine; and to speak truth it stood not with any great sense or proportion, that that place which was privileged and exempted from the jurisdiction of the courts of Westminster should be meant by the parliament to be subjected to the jurisdiction of that council.

Secondly he said that those reasons, which we do much insist upon for the four shires, hold not for *Cheshire.* For we say it is fit the subject of *Wales* be not forced to sue at Westminster, but have his justice near hand; so may he have in

Cheshire, because there is both a justice for common law and a chancery; we say it is convenient for the prince, if it please the King to send him down, to have some jurisdiction civil as well as for the peace; so may he have in Cheshire as earl of Chester. And therefore those grave men had great reason to conceive that the parliament did not intend to include Cheshire.

And whereas they pinch upon the last words in the certificate, *viz.* that Cheshire was no part of the dominion nor of the marches, they must supply it with this sense,—not within the meaning of the statute: for otherwise the judges could not have discerned of it, for they were not to try the fact, but to expound the statute; and that they did upon those reasons which were special to Cheshire, and have no affinity with the four shires.

And, therefore if it be well weighed, that certificate makes against them; for as *exceptio firmat legem in casibus non exceptis*, so the excepting of that shire by itself doth fortify, that the rest of the shires were included in the very point of difference.

After this he showed a statute in 18 Eliz. by which provision is made for the repair of a bridge called Chepstow bridge, between Monmouth and Gloucester, and the charge lay in part upon Gloucestershire; in which statute there is a clause, that if the justices of peace do not their duty in levying of the money they shall forfeit five pounds, to be recovered by information before the council of the marches; whereby he inferred that the parliament would never have assigned the suit to that court, but that it conceived Gloucestershire to be within the jurisdiction thereof. And therefore he concluded that here is in the nature of a judgment by parliament, that the shires are within the jurisdiction.

The third and last argument of the King's solicitor in the case of the marches, in reply to Serjeant Harris.

This case groweth now to some ripeness, and I am glad we have put the other side into the right way. For in former arguments they laboured little upon the intent of the statute of 34 H. VIII. and busied themselves in effect altogether about the force and use of the word *marches;* but now finding that *litera mortua non prodest,* they offer at the true state of the

question, which is the intent. I am determined therefore to reply to them in their own order, *ut manifestum sit* (as he saith) *me nihil aut subterfugere voluisse reticendo, aut obscurare dicendo.*

All which hath been spoken on their part consisteth upon three proofs.

The first was by certain inferences to prove the intent of the statute.

The second was to prove the use of the word *marches* in their sense long after both statutes, both that of 27, which extincted the lordships marchers, and that of 34, whereupon our question ariseth.

The third was to prove an interruption of that practice and use of jurisdiction upon which we mainly insist, as the best exposition of the statute.

For the first of these concerning the intention, they brought five reasons.

The first was that this statute of 34 was grounded upon a platform, or preparative, of certain ordinances made by the King two years before, *viz.* 32. In which ordinances there is the very clause whereupon we dispute, *viz.* That there should be and remain in the dominion and principality of Wales a president and a council. In which clause nevertheless the word *marches* is left out, whereby they collect that it came into the statute of 34 but as a slip, without any farther reach or meaning.

The second was, that the mischief before the statute, which the statute meant to remedy, was that Wales was not governed according to similitude or conformity with the laws of England. And therefore, that it was a cross and perverse construction, when the statute laboured to draw Wales to the laws of England, to constrne it that it should abridge the ancient subjects of England of their own laws.

The third was that in case of so great importance it is not like that if the statute had meant to include the four shires it would have carried it in a dark general word, as it were *noctanter*, but would have named the shires to be comprehended.

The fourth was, the more to fortify the third reason, they observed that the four shires are remembered and named in several places of the statute, three in number; and therefore it is not like that they would have been forgotten in the principal place, if they had been meant.

The fifth and last was, that there is no clause of attendance, that the sheriffs of the four shires should attend the lord president and the council; wherein there was urged the example of the acts of parliament, which erected courts; as the court of Augmentations, the court of Wards, the court of Survey, in all which there are clauses of attendance; whereupon they inferred that evermore where a statute gives a court jurisdiction, it strengtheneth it with a clause of attendance; and therefore no such clause being in this statute, it is like there was no jurisdiction meant. Nay farther they noted, that in this very statute for the justices of Wales there is a clause of attendance from the sheriffs of Wales.

In answer to their first reason, they do very well in my opinion to consider Mr. Attorney's business and mine, and therefore to find out for us evidence and proofs which we have no time to search; for certainly nothing can make more for us than these ordinances which they produce. For the diversity of penning of that clause in the ordinances, where the word *marches* is omitted, and that clause in the statute where the word *marches* is added, is a clear and perfect direction what was meant by that word. The ordinances were made by force and in pursuance of authority given to the King by the statute of 27. To what did that statute extend? Only to Wales. And therefore the word *marches* in the ordinances is left out. But the statute of 34 respected not only Wales, but the commixed government, and therefore the word *marches* was put in. They might have remembered that we built an argument upon the difference of penning of that statute of 34 itself in the several clauses of the same; for that in all other clauses, which concern only Wales, the word *marches* is ever omitted, and in that clause alone that concerneth the jurisdiction of the president and council it is inserted. And this our argument is notably fortified by that they now show of the ordinances, where in the very selfsame clause touching the president and council, because the King had no authority to meddle but with Wales, the word *marches* is omitted. So that it is most plain, that this word comes not in by chance or slip, but with judgment and purpose as an effectual word; for, as it was formerly said, *opposita juxta se posita magis elucescunt.* And therefore I may likewise urge another place in the statute which is left out in the ordinance. For I find there is a clause that the town of Bewdley, which is

confessed to be no lordship marcher, but to lie within the county of Worcester, yet, because it was an exempted jurisdiction, is by the statute annexed unto the body of the said county. First this shows that the statute of 34 is not confined to Wales and the lordships marchers, but that it intermeddles with Worcestershire. Next, do you find any such clause in the ordinances of 32? No. Why? Because they were appropriate to Wales. So that in my opinion nothing could inforce our exposition better than the collating of the ordinance of 32 with the statute of 34.

In answer to the second reason, the course that I see often taken in this cause makes me think of the phrase of the Psalm, *starting aside like a broken bow:* so when they find their reasons broken, they start aside to things not in question. For now they speak as if we went about to make the four shires Wales, or to take from them the benefit of the laws of England, or their being accounted amongst the ancient counties of England. Doth any man say that those shires are not within the circuits of England, but subject to the justices of Wales; or that they should send but one knight to the parliament, as the shires of Wales do; or that they may not sue at Westminster, in chancery, or at common law, or the like? No man affirms any such things. We take nothing from them, only we give them a court of summary justice in certain causes at their own doors.

And this is *nova doctrina,* to make such an opposition between law and equity, and between formal justice and summary justice. For there is no law under heaven which is not supplied with equity; for *summum jus, summa injuria;* or as some have it, *summa lex, summa crux.* And therefore all nations have equity; but some have law and equity mixed in the same court, which is the worse; and some have it distinguished in several courts, which is the better. Look into any counties Palatine, which are small models of the great government of kingdoms, and you shall never find any but had a chancery.

Lastly it is strange that all other places do require courts of summary justice, and esteem them to be privileges and graces, and in this case[1] only they are thought to be servitudes and loss of birthright. The universities have a court of summary justice, and yet I never heard that scholars complain their birthright was taken from them. The stannaries have them,

[1] "Cause" in MS.

and you have lately affirmed the jurisdiction[1]; and yet you have taken away no man's birthright. The court at York, whosoever looks into it, was erected at the petition of the people, and yet the people did not mean to cast away their birthright. The court of wards is mixed with discretion and equity; and yet I never heard that infants and innocents were deprived of their birthrights. London, which is the seat of the kingdom, hath a court of equity, and holdeth it for a grace and favour; how then cometh this case to be singular? And therefore these be new phrases and conceits, proceeding of error or worse; and it makes me think that a few do make their own desires the desires of the country, and that this court is desired by the greater number, though not by the greater stomachs.

In answer to the third reason, if men be conversant in the statutes of this kingdom, it will appear to be no new thing to carry great matters in general words without other particular expressing. Consider but of the statute of 26 H. VIII. which hath carried estates tails under the general words of estates of inheritance. Consider of the statute of 16 R. II. of *præmunire*, and see what great matters are thought to be carried under the word *alibi*. And, therefore it is an ignorant assertion to say that the statute would have named the shires, if it had meant them.

Secondly the statute had more reason to pass it over in general words, because it did not ordain a new matter, but referreth to usage; and though the statute speaks generally, yet usage speaks plainly and particularly, which is the strongest kind of utterance or expressing. *Quid verba audiam cum facta videam.*

And thirdly this argument of theirs may be strongly retorted against them. For as they infer, that the shires were not meant because they were not included by name; so we infer, that they are meant because they are not excepted by name, as is usual by way of proviso in like cases. And our inference hath far greater reason than theirs, because at the time of the making of the statute they were known to be under the jurisdiction. And, therefore, that ought to be most plainly expressed which should work a change, and not that which should continue things as they were.

In answer to their fourth reason, it makes likewise plainly

[1] Mich. T. 4 Jac. 4 Inst. 231.

against them. For there be three places where the shires be named, the one for the extinguishing of the custom of gavelkind; the second for the abolishing of certain forms of assurance which were too light to carry inheritance and freehold; the third for the restraining of certain franchises to that state they were in by a former statute. In these three places the words of the statute are, *the lordships marchers annexed unto the counties of Hereford, Salop, &c.*

Now mark, if the statute conceived the word *marches* to signify lordships marchers, what needeth this long circumlocution? It had been easy to have said, within the *marches.* But because it was conceived that the word *marches* would have comprehended the whole counties, and the statute meant but of the lordships marchers annexed; therefore they were enforced to use that *periphrasis* or length of speech.

In answer to the fifth reason I give two several answers; the one, that the clause of attendance is supplied by the word *incidents;* for the clause of establishment of the court hath that word, *with all incidents to the same as heretofore hath been used;* for execution is ever incident to justice or jurisdiction: the other, because it is a court, that standeth not by the act of parliament alone, but by the King's instructions whereto the act refers. Now no man will doubt but the King may supply the clause of attendance; for if the King grant forth a commission of oyer and terminer, he may command what sheriff he will to attend it; and therefore there is a plain diversity between this case and the cases they vouch of the courts of Wards, Survey, and Augmentations: for they were courts erected *de novo* by parliament, and had no manner of reference either to usage or instructions; and therefore it was necessary that the whole frame of those courts, and their authority both for judicature and execution should be described and expressed by parliament. So was it of the authority of the justices of Wales in the statute of 34, mentioned because there are many ordinances *de novo* concerning them; so that it was a new erection, and not a confirmation of them.

Thus have I, in confutation of their reasons, greatly as I conceive confirmed our own, as it were with new matter: for most of that they have said made for us. But as I am willing to clear your judgments, in taking away the objections; so I must farther pray in aid of your memory for those things which

we have said, whereunto they have offered no manner of answer. For unto all our proofs which we made touching the intent of the statute, which they grant to be the spirit and life of this question, they said nothing: as not a word to this, That otherwise the word *marches* in the statute should be idle or superfluous: not a word to this, That the statute doth always omit the word *marches* in things that concern only Wales: not a word to this, That the statute did not mean to innovate, but to ratify, and therefore if the shires were in before, they are in still: not a word to the reason of the commixed government, as, That it was neccessary for the reclaiming of Wales to have them conjoined with the shires; That it was necessary for commerce and contracts, and properly for the ease of the subject of Wales against the inhabitants of the shires; That it was not probable that the parliament meant the Prince should have no jurisdiction civil in that place, where he kept his house. To all these things, which we esteem the weightiest, there is *altum silentium*, after the manner of children that skip over where they cannot spell.

Now to pass from the intent to the word. First I will examine the proofs they have brought that the word was used in their sense after the statutes 27 and 34: then I will consider what is gained, if they should prove so much: and lastly I will briefly state our own proofs touching the use of the word.

For the first it hath been said, that whereas I called the use of the word *marches*, after the statute of 27, but a little chime at most of an old word, which soon after vanished, they will now ring us a peal of statutes to prove it. But if it be a peal, I am sure it is a peal of bells, and not a peal of shot: for it clatters, but it doth not strike: for of all the catalogue of statutes I find scarcely one save those that were answered in my former argument, but we may with as good reason affirm in every of them the word *marches* to be meant of the counties marches, as they can of the lordships marchers. For to begin upwards.

The statute 39 Eliz., for the repair of Wilton Bridge, no doubt doth mean the word *marches* for the counties; for the bridge itself is in Herefordshire, and the statute imposeth the charge of reparation upon Herefordshire by compulsory means, and permitteth benevolence to be taken in Wales, and the marches. Who doubts but this meant of the other three shires,

which have far greater use of the bridge than the remote counties of Wales.

For the statute 5 Eliz. concerning perjury, it hath a proviso, that it shall not be prejudicial to the council of the marches for punishing of perjury. Who can doubt but that here marches is meant of the shires, considering the perjuries committed in them have been punished in that court as well as in Wales?

2 & 3 Ed. 6. cap. 13. sec. 16. For 2 E. VI. and the clause therein for restraining tithes of marriage portions in Wales and the marches, why should it not be meant of counties? For if any such customs had crept and encroached into the body of the shires out of the lordships marchers, no doubt the statute meant to restrain them as well there as in the other places.

And so for the statute of 32 H. VIII. c. 37. which ordains that the benefit of that statute for distress to be had by executors should not extend to any lordship in Wales, or the marches of the same where [mises][1] are paid, because that imports a general release; what absurdity is there, if there the marches be meant for the whole shires? For if any such custom had spread so far the reason of the statute is alike.

As for the statutes of 37 H. VIII. and 4 E. IV. for the making and appointing of the *custos rotulorum*, there the word *marches* must needs be taken for limits, according to the etymology and derivation; for the words refer not to Wales, but are thus: *within England and Wales, and other the King's dominions, marches, and territories*, that is, *limits and territories;* so as I see no reason but I may truly maintain my former assertion, that after the lordships marchers were extinct by the statute of 27, the name also of *marches* was discontinued, and rarely if ever used in that sense.

But if it should be granted that it was now and then used in that sense, it helps them little; for first it is clear, that the legal use of it is gone, when the thing was extinct; for *nomen est rei nomen;* so it remains but *abusivè*, as if one should call Guletta Carthage, because it was once Carthage; and next, if the word should have both senses, and that we admit an equivocation, yet we so overweigh them upon the intent, as the balance is soon cast.

Yet one thing I will note more; and that is, that there is a

[1] So in later editions. There is a blank in the MS. Generally, Bacon's corrections become fewer, and small errors are oftener left untouched, towards the end of the MS.

certain confusion of tongues on the other side, and that they cannot well tell themselves what they would have to be meant by the word *marches;* for one while they say it is meant for the *lordships marchers generally;* another while they say that it is meant for the inward *marches on Wales' side only;* and now at last they are driven to a poor shift, that there should be left some *little lordship marcher* in the dark[1], as *casus omissus,* not annexed at all to any county; but if they would have the statute satisfied upon that only, I say no more to them, but *aquila non capit muscas.*

Now I will briefly remember unto you the state of our proofs of the word.

First, according to the laws of speech we prove it by the etymology, or derivation, because *march* is the Saxon word for limit, and *marchio* is *comes limitaneus;* this is the opinion of Camden and others.

Next, we prove the use of the word in the like case to be for counties, by the example of the marches of Scotland: for as it is prettily said in Walker's case by Gaudy, if a case have no cousin, it is a sign it is a bastard, and not legitimate; therefore we have showed you a cousin, or rather a brother, here within our own island of the like use of the word. And whereas a great matter was made that the now middle shires were never called the marches of Scotland, but the marches of England against Scotland, or upon Scotland, it was first answered that that made no difference; because sometimes the marches take their name of the inward country, and sometimes of the out country; so that it is but *inclusivè* and *exclusivè;* as for example, that which we call in vulgar speech this day *fortnight,* excluding the day, that the law calls *quindena,* including the day; and so likewise, who will make a difference between the banks of the sea, and the banks against the sea, or upon the sea? But now to remove all scruple, we show them Littleton in his chapter of Grand Serjeanty, where he saith, there is a tenure by *Cornage* in the *marches of Scotland;* and we show them likewise the statute of 25 E. III. of labourers, where they are also called the *marches* of *Scotland.*

Then we show some number of bills exhibited to the council there before the statute, where the plaintiffs have the addition

[1] "Deck" in MS.: corrected in the later editions, I know not whether on any authority.

of place confessed within the bodies of the shires, and no lordships marchers, and yet are laid to be in the marches.

Then we show divers accounts of auditors in the Duchy from H. IV. downwards where the indorsement is *in marchiis Walliæ*, and the contents are possessions only of Hereford and Gloucestershire (for in Shropshire and Worcestershire the Duchy hath no lands); and whereas they would put it off with a *cuique in sua arte credendum*,—they would believe them, if it were in matter of accounts;—we do not allege them as auditors, but as those that speak English to prove the common use of the word;—*loquendum ut vulgus*.

We show likewise an ancient record of a patent to Harbert in 15 E. IV. where Kilpeck is laid to be in *com. Hereford in marchiis Walliæ;* and lastly we show again the statute of 25 E. III. where provision is made, that men shall labour in the summer where they dwell in the winter, and there is an exception of the people of the counties of Stafford and Lancaster, &c. and of the marches of Wales and Scotland; where it is most plain, that the marches of Wales are meant for counties, because they are coupled both with Stafford and Lancaster, which are counties, and with the marches of Scotland, which are likewise counties; and as it is informed, the labourers of those four shires do come forth of their shires, and are known by the name of Cokers to this day.

To this we add two things, which are worthy consideration; the one, that there is no reason to put us to the proof of the use of this word *marches* sixty years ago, considering that usage speaks for us; the other, that there ought not to be required of us to show so frequent an use of the word *marches* of ancient time in our sense, as they showed in theirs, because there was not the like occasion: for when a lordship marcher was mentioned it was of necessity to lay it in the marches, because they were out of all counties, but when land is mentioned in any of these counties, it is superfluous to add *in the marches;* so as there was no occasion to use the word *marches*, but either for a more brief and compendious speech to avoid the naming of the four shires, as it is in the statute of 25 E. III. and in the endorsement of accounts, or to give a court cognizance and jurisdiction, as in the bills of complaint; or *ex abundanti*, as in the record of Kilpeck.

There resteth the third main part, whereby they endeavour

to weaken and extenuate the proofs which we offer touching practice and possession, wherein they allege five things.

First, that Bristol was in until 7 Eliz. and then exempted.

Secondly, that Cheshire was in until 11 Eliz. and then went out.

Thirdly, they allege certain words in the instructions to Cholmley, vice-president, in 11 Eliz. at which time the shires were first comprehended in the instructions by name and in these words *annexed by our commission:* whereupon they would infer that they were not brought in the statute, but only came in by instructions, and do imagine that when Cheshire went out, they came in.

Fourthly they say, that the intermeddling with those four shires before the statute was but an usurpation and toleration, rather than any lawful and settled jurisdiction; and it was compared to that which is done by the judges in their circuits, who end many causes upon petitions.

Fifthly they allege Sir John Mullen's case, where it is said *consuetudo non præjudicat veritati.*

There was moved also, though it were not by the counsel, but from the judges themselves, as an extenuation, or at least an obscuring of the proof of the usage and practice, in that we show forth no instructions from 17 H. VIII. to 1 Mariæ.

To these six points I will give answer, and, as I conceive, with satisfaction.

For Bristol I say it teacheth them the right way, if they can follow it; for Bristol was not exempt by any opinion of law, but was left out of the instructions upon supplication made to the Queen.

For Cheshire we have answered it before, that the reason was because it was not probable that the statute meant to make that shire subject to the jurisdiction of that council, considering it was not subject to the high courts at Westminster, in regard it was a county palatine. And whereas they say, that so was Flintshire too, it matcheth not; because Flintshire is named in the statute for one of the twelve shires of Wales.

We showed you likewise effectual differences between Cheshire and these other shires: for that Cheshire hath a Chancery in itself, and over Cheshire the Princes claim jurisdiction as Earl of Chester; to all which you reply nothing.

Therefore I will add this only, that Cheshire went out *secundo*

flumine, with the good will of the state; and this is sought to be evicted *adverso flumine*, cross the state; and as they have the[1] opinion of four judges for the excluding of Cheshire, so we have the opinions of two great learned men, Gerrard and Bromley, for the including of Worcester: whose opinions, considering it was but matter of opinion, and came not judicially in question, are not inferior to any two of the other; but we say that there is no opposition or repugnancy between them, but both may stand.

For Cholmley's instructions, the words may well stand *that those shires are annexed by commission;* for the King's commission or instructions (for those words are commonly confounded) must cooperate with the statute, or else they cannot be annexed. But for that conceit that they should come in but in 11, when Cheshire went out, no man that is in his wits can be of that opinion, if he mark it. For we see that the town of Glocester, &c. is named in the instructions of 1 Mar. and no man, I am sure, will think that Glocester town should be in, and Glocestershire out.

For the conceit, that they had it but *jurisdictionem precariam*, the precedents show plainly the contrary; for they had coercion, and they did fine and imprison, which the judges do not upon petitions; and besides, they must remember that many of our precedents which we did show forth were not of suits originally commenced there, but of suits remanded from hence out of the King's courts, as to their proper jurisdiction.

For Sir John Mullen's case, the rule is plain and sound; that where the law appears, contrary usage cannot control law: which doth not at all infringe the rule of *optima legum interpres consuetudo;* for usage may expound law, though it cannot overrule law.

But of the other side I could show you many cases where statutes have been expounded directly against their express letter to uphold precedents and usage, as 2, 3 Phil. et Mar. upon the statute of Westminster, that ordained that the judges *coram quibus formatum erit appellum* shall inquire of the damages, and yet the law ruled that it shall be inquired before the judges of Nisi Prius. And the great reverence given to precedents appeareth in 39 H. VI. 3 E. IV. and a number of other books. And the difference is exceedingly well taken in

[1] I have added the article, which the MS. omits.

Slade's case, Coke's Reports, 4. that is, where the usage runs but amongst clerks, and where it is in the eye and notice of the judge; for there it shall be presumed, saith the book, that if the law were otherwise than the usage hath gone, that either the counsel or the parties would have excepted to it, or the judges *ex officio* would have discerned of it, and found it; and we have ready for you a calendar of judges more than at this table, that have exercised jurisdiction over the shires in that county.[1] 4 Co. 94.

As for exception touching the want of certain instructions, I could wish we had them; but the want of them in my understanding obscureth the case little. For let me observe unto you, that we have three forms of instructions concerning these shires extant; the first names them not expressly, but by reference it doth, *viz.* that they shall hear and determine, &c. *within any of the places or counties within any of their commissions;* and we have one of the commissions, wherein they are named; so as upon the matter they are named. And of this form are the ancient instructions before the statute, 17 H. VIII. when the Princess Mary went down.

The second form of instructions go farther; for they have the towns and exempted places within the counties named, with *tanquam*,—as well within the city of Glocester, the liberties of the duchy of Lancaster, &c. as within any of the counties of any of their commissions; —which clearly admits the counties to be in before. And of this form are the instructions 1 Mariæ, and so along until 11 Eliz.

And the third form, which hath been continued ever since, hath the shires comprehended by name. Now it is not to be thought, but the instructions which are wanting are according to one of these three forms which are extant. Take even your choice, for any of them will serve to prove that the practice there was ever authorised by the instructions here. And so upon the whole matter, I pray report to be made to his Majesty, that the president and the council hath jurisdiction, according to his instructions, over the four shires, by the true construction of the statute of 34 H. VIII.

[1] So in MS.

ARGUMENT

IN

CHUDLEIGH'S CASE.

PREFACE.

THIS argument has been recovered by Mr. Spedding, and is here translated from the Law French in which it is preserved, Lansd. MSS. 1121. It seems to be a complete and careful report, but not a revised one, and I have had sometimes to fill up or correct an obscure or mutilated sentence conjecturally.

The case itself is fully reported by Coke, who argued on the same side with Bacon, and by Anderson and Popham, who gave judgment on that same side; and Mr. Hargrave, in his MS. notes on *Popham's Reports* in the British Museum, mentions an unedited report by Owen, also one of the majority of the judges, in the Library of Lincoln's Inn.

I believe Bacon does not exaggerate the importance attached to the case and decision at the time, in his frequent mention of it in the *Reading;* and the discussion which the whole doctrine of uses there met with must unquestionably have helped "to reduce it to a true and sound exposition:" yet it seems equally clear that "the many doubts and perplexed questions which had since arisen, and were not yet resolved" at the time of the *Reading*, have ended by restricting the authority of the decision to a very small part of the ground over which it was conceived to extend, and in fact overruling the doctrine of the majority, at least, of the judges who decided in favour of the defendants.

For though it be true that some of the judges in that majority did point out that the particular limitations in Chudleigh's settlement were such as might exist at Common Law, and that in such cases they would have been destroyed in the event which happened, yet they mostly went on the doctrine of the *scintilla juris*, which applied equally to springing and shifting uses as to those in the nature of contingent remainders, and would have made them all equally destructible before vesting; and some of them, and some also of those who did not go upon

this ground, seem to have been prepared to hold (as Coke inclined) that all limitations unknown to the Common Law should, after the statute, be held void in the creation.

In Bacon's argument, which was in Easter Term, 1594, and was the last delivered, there is no notice whatever of this Common Law character of these limitations: and the inference one would naturally draw from this seems to me confirmed by Coke's report of the argument (after judgment delivered), and by other notices,—*viz.* that the observation came from the judges themselves.

There are passages in this argument which illustrate the *Reading*, though we must, of course, be cautious of confounding the arguments of the advocate with the subsequent conclusions of the expositor.

CHUDLEIGH'S CASE.

THE ARGUMENT OF FRANCIS BACON.

He states the case to be that, Sir Richard Chidley, being seised in fee of a manor whereof the land in question was parcel, infeoffed Sir G. S. and others to the use of himself and the heirs of his body by sundry wives, remainder to the use of the feoffees and their heirs during the life of Christopher Chidley his eldest son, remainder in tail to the first, second, third, and so to the tenth son of the said Chr. Chidley, remainder to the other sons of the said Richard then living, *viz.* to Thomas, to Oliver, and Nicholas, the remainder to his own right heirs in fee: and then died in the lifetime of his feoffees: and so, there being an intermediate remainder between the estate of the feoffees for the life of Chr. and the remainder in fee which was in Chr., the feoffees infeoffed the said Chr., so excluded from the limitations. Afterwards Chr. has issue, Streightley Chidley and John Chidley, and the said Chr. infeoffs Sir John Chichester, who infeoffs Philip Chichester, under whom the defendant claims. Streightly died without issue; John Chidley enters and grants a lease to the plaintiff, on whom the defendant re-enters; and the plaintiff brings trespass. And so the title is between the assignee of Christopher, who makes title under[1] the feoffees in disaffirmance of the contingent use, and the issue of John Chidley, who claims by the contingent use. And the simple question is but this: If the possession be estranged from the first privity at the time when the contingent use ought to arise, and all possibility gone of reviving it by the return of the feoffees (who have granted away their future right included in the livery), whether the springing use be not utterly extinct. And he held that it was.

The case being of great importance, touching the Queen in

[1] Que connaye del feoffees.

her prerogative and the subjects in their assurances, was on the side which I argue notably declared by Mr. Attorney General[1], who, foreseeing the downfal and destruction of the uses which have so long reigned, made a history of their lives and ripped them up from their cradle, demonstrating that they were engendered in fraud and deceit, and manifesting the notes and discredits which sundry good laws from time to time have inflicted on them. Which course I do not intend to follow. But the matter thereafter is good and pertinent. And in confutation I will not bind myself to Mr. Attorney's order, but pursue my own course, which is the order the matter itself more aptly induces for resolution and decision: suffice it that no material thing is objected but it shall be answered: what is of weight shall be expressly refuted; the others of less importance I will shake off in the course of my argument.

In my order I will first endeavour to remove all prejudices, and make it appear evidently that the case on my side is not foiled with any contrary authorities, but stands now to be determined by the judges; and having freed the judges from coming prejudicate by any former judgments, I will set forth the consideration of the Statute which is the oracle of this question. Then having made the Statute clear, or at least favourably ambiguous for my side, I will capitulate the multitude of inconveniences which such springing uses set on foot in the state of the government: for, as no expediency ought to cause judges to decline from the truth of the law where it is express and direct, so *in ambiguis eam sequimur rationem quæ vitio caret.*

The prejudice which I have to remove in this cause is in two kinds: the one controls the cases of authority (which have been put with advantage); the other is a generally received opinion, with a continued practice which is more forcible.

Touching authorities, they first object the case of Mantell in 34 H. VIII., which was that Mantell had covenanted in consideration of money and marriage to stand seised to the use of his wife for the term of her life, and after to the use of the heirs of his body, and it was agreed by the judges, on great advice, that the use was raised by the covenant. On which Mr. Brooke says "that the land was saved to the issue"; by which Mr. Atkinson enforces that the use arises out of the

Br. Feoffm. al uses, 16.

[1] Coke. The professional rivalry with him seems to break out here and below, though they were on the same side.

possession which the King had by attainder. To which I answer *legis aliud agentis parva auctoritas.* The reason of this resolution was no other than what every student at this day knows to be clear, *viz.* that such a covenant is not executory by action of covenant, but an use rises of itself. As then nothing comes of it, Mr. Brooke abridges this case in point of difference with 21 H. VII. where the covenant was that the land should descend, which covenant gives but an action. Otherwise it is here. And so the opinion is but an inference. But it also has its particular answer: *viz.* that this use is executed and arises in Mantell himself, and not only in the issue of his body. And the reason is not because he has a freehold in the particular estate (for this is only in right of his wife; and I agree that if a man make a lease for life to a feme covert, the remainder to the right heirs of the husband, this is not executed in the husband, as it would be if the particular estate had been limited to himself,) but the cause of its being executed is that the law understands that in the interim, until there is an heir of the body of Mantell, the use[1] in fee is in Mantell himself; and by reason of this doubling and confusion of uses the law is, that the limitation in tail is in himself; as in the famous cause lately pending between the Earl of Bedford and heirs female; where it was adjudged, after long argument, that if a man make a feoffment in fee to the use of one in tail, the remainder to the use of his right heirs; inasmuch as the law intends an use to him and his heirs until he has right heirs, and the having a double use, — one to him and his heirs executed, the other to his right heirs contingent — should be impertinent; for this reason the use was executed in himself, and by the bargain and sale he granted it away. And if it be so in Mantell's case then is it nothing more than tenant in tail attainted of felony, which does not forfeit the estate tail. And so the case is doubly answered.

34 & 35 Eliz. [Moor, 718.]

In 38 Hen. VIII. *Br. Assurances* 1., is the case of a device and invention for preventing the heir from aliening: and the device was that a feoffment should be made to the use of the ancestor for life without impeachment of waste, and after to the use of the heir and his heirs until he consented or concluded to aliene, and after to the use of a stranger and his heirs. To this case I answer, first that it is founded on a palpable error; and in

[1] *i. e.* the old use.

cases as in testimonies, if one is found faulty in one point it deserves no credit in others. And it is clear enough that an estate in fee simple cannot be restrained from alienation, [in use] any more than in possession. But be the case pardoned of this error, and considered further. I ask when the new use is to spring by this condition? Plainly on the consent and conclusion. On the other hand, when would the first uses be disturbed? Not before the alienation which removes the possession from privity. Now, must not a conclusion of alienation precede an actual alienation? Certainly it must: and therefore the springing use has the start, and prevents the disturbance; and if this case be well scanned, I [1] say it makes greatly for me, for in truth it was the opinion of this inventor that if the contingent use had been limited to await the alienation consummate, it had come *nimis tarde;* and to mend this, the rising was appointed on the conclusion: and so I repent that I have discredited the case, as it makes for me.

Br. Feoffm. al uses, pl. 30.

In 6 Ed. VI. feoffment was made to the use of J. S. and his heirs until J. D. should pay a certain sum, and then to the use of the said J. D. and his heirs: the payment was made, and it was taken for a disputable point whether without actual entry of the feoffees, the use should be executed; and Mr. Brooke gives politic counsel herein, that entry be made both in the name of *cestui que use* and the feoffees, and so to take advantage of each of their rights. This case, duly considered, makes directly for me; for if it was so doubtful whether the contingent use should be executed without an entry of the feoffees when there was no disturbance, it is consequentially admitted as clear that it cannot rise if there be a disturbance: *nam qui dubitat de majore minus* [*concedit*]. And the learning is of the like nature in 4 Hen. VII. and 35 Hen. VIII. Dyer, 57.: where an estate was executed by the *cestui que use* by force of the statute 1 Rich. III., and the question was, whether for vesting the use in the issue in tail, or in him in remainder, there needed any entry of the feoffees. And it was granted that no greater estate passed by such conveyance than could rightfully pass, inasmuch as it is but an authority executed, and that those that hold over are as tenants at sufferance; and yet it was questionable if it should not be necessary to revive the possession of the feoffees, although there was no real or material

Br. Feoffm. al uses, pl. 22. [Case of *cestui que use* with limited estate granting a larger estate.]

[1] The MS. here and at the bottom of p. 622. speaks in the third person, as from the Reporter.

disturbance. And so these cases support each other and yield this sense of law; that on each contingent or discontinued use, it is dubious whether there is need of the new strength of possession by the feoffees: [opinions are contradictory where there is no disturbance;][1] but it is clear that it is necessary where there is a disturbance; and so this case fortified with the other swayeth solely to my side.

In 3 Ma. the case was, that one had taken a sum of money beforehand for the marriage of his son and heir, and covenanted that if his son should refuse he would stand seised to the use of the covenantee and his heirs for securing the money till it should be paid: the covenantee died; and after, a refusal was made; and the question is, whether the heir shall be in ward who comes in by colour of a title anccstral descended. But to what purpose makes this case? For we are not arguing whether contingent uses are void in their limitation *ab initio* without any impediments *ex post facto*; and because there is no interruption in this case, but all was in privity, it is merely impertinent.

[See apparently on same point Dyer, 298b, pl. 30, 369a, pl. 51.; 1 Rep. 133.]

In 6 and 7 Eliz. (the case of the Lady Ann Manners, on assize, judged in 8 Hen. VIII., and after error brought on it and not pursued), the case was that, upon a treaty of marriage, in consideration thereof one covenanted that he should receive the profits of certain lands during his life, and afterwards would stand seised to the use of his son and his wife after the espousals should be solemnised, and afterwards (says Mr. Atkinson) he executed divers assurances by bargains and sales, fines, feoffments, and recoveries, to ruinate the uses limited, and after intermarriage was had, and the son and daughter entered after the death of the father and made a feoffment to the first uses; and it was adjudged lawful. And no marvel; for Mr. Atkinson has mistaken the book and transposed the time, which is material; for the espousals, which was the time of limitation, were solemnised before any assurance made; and so it was a present use and not contingent. Now it is not doubtful but that a present use can be discontinued, and therefore the judgment must be taken to be that the feoffor, notwithstanding all his assurances, continued the pernancy of the profits; which shows that all was covinous. And so this case rightly understood makes nothing to our purpose.

Dy. 234.

In 17 Eliz. a married man made a feoffment to the use of

Dy. 340.

[1] "Cont.: nul disturbance."

his second wife, and afterwards joined with the feoffees in certain conveyances to new uses, and afterwards took a second wife, and died; and the second wife entitled herself by the first use. It must be granted this is our very case. But see what was the resolution or better opinion. The court was divided. On the contrary part were Monson and Harper; on our part Dyer and Manwood, in number equal, judges famous and skilled: the other two were not advanced as ours were, who have been, the one for profound and sound judgment, the other for subtlety, the most absolute judges that have ever been. Moreover, the other two do not agree between themselves in the reason, which enfeebles their opinion; for they do not agree whether the feoffees have a title or an authority. But our two agree in opinion and reason. Which reason, to be more memorable, Mr. Dyer has put into Latin words: *adhuc remanet quædam scintilla juris et tituli, quasi medium quid inter utrosque status.* Which words are very significant. For the most proper sense is that, if two uses be limited, one to determine and the other to commence, between the cesser of the one and the rising of the other, the feoffees (who are vessels, as Mr. Atkinson terms them) receive the land from the one *cestui que use* and deliver it to the other, and have a right, in the sight of the law, between the two. And so this last case, being of the greatest effect, makes for our part.

Br. Feoffm. al uses, pl. 50.

But true it is that the case in 30 Hen. VIII. is stronger against us; that if a man covenant that, on being infeoffed of the manor of D., he will stand seised of the manor of S., this use binds the land into whatever hands it comes. Which case, as it is in a book of the smallest authority, so the absurdity and incongruity of the reason alleged destroys the conclusion, credit, and authority of it. For it seems he compares an use to a charge: which are things of as contrary a nature as can be imagined; for the essence of the one consists in privity, the other regards it not. And so the case is of no credit against such a mass of arguments and reasons as shall be shown hereafter.

[Plowd. 352.]

And I cite as on my part the case in 10 Eliz., Delamer's case, adjudged on great advice: for in the argument thereof are these words, "that the statute of 27 Hen. VIII. conveys no possession to the use, but only to an use *in esse*;" and a contingent use cannot be said to be an use *in esse*, any more

than a suspended or discontinued use, which differ inasmuch as the one resembles a person dead, and the other a person not born; the one future, the other past: whereof both have need of the entry of the feoffees, to give its birth to the one, and to revive the other. And all the parts of the case, well considered, make for our part.

Now, as to reputation and common opinion, it will be said that after the statute of 27 Hen. VIII. made, for sixty years past, infinite of these assurances have been made, and that by the most learned and mighty, who have endeavoured to perpetuate their families; and if it be error, *communis error facit jus.* To which I answer, that always the judges in their judicial knowledge have used to reform the erroneous practices and tolerations of the times. Mr. Richill, whom Littleton calls his master, made a perpetuity [of an estate] in possession, of which many at this time no doubt do the like, *et in hoc discipulus fuit suprà magistrum.* And I doubt not but the device of a rent-charge granted by him in remainder to frustrate a common recovery had by tenant in tail was advised by the most skilful lawyers, and admitted for law until lately, when Hunt and Chappel's case was adjudged. And it is likely that counsellors of the law have advised men in such cases, that when the cases come to be scanned it is hard to argue how the law will be taken; but in the mean time, if they prove void, yet the law varies as it chances, and it will be a bridle on the heir that he shall not venture to sell, and a scruple to the purchaser that he shall not buy; and so it is but a conveyance adventured: inconvenience there is none. And to the text of the common law, *communis error facit jus,* one doctor says, *in favorabilibus;* another says, *facit jus,* subintellige, *dormire:* but the learned judges can awaken it when it pleases them.

Lit. 720.

[1 Rep. 61.]

Now, to consider the very natural sense of the statute of 27 Hen. VIII. For I will not have it bruited that it is endeavoured to frame the law to the time. For, as you my lords judges better know, so, with modesty, I may put it in your remembrance, that your authority over the laws and statutes of this realm is not such as the Papists affirm the Church to have over the Scriptures, to make them a shipman's hose or nose of wax; but such as we say the Church has over them, *scil.* to expound them faithfully and apply them properly; and therefore the rule is of effect, *non leges politiis aptandæ,*

sed politiæ legibus. And so committing all reasons of Parliament to silence awhile, as if there were no inconvenience, I will endeavour to show the intent and letter of the statute, the sense of which ought to be taken:

1st, From the consideration of the law before the statute:

2nd, From the preamble of the statute:

3rd, From the body of the statute.

Touching the law before the statute, I will not range far, but on it I will ground two forcible reasons which decide the controversy.

1. It is to be noted that the statute of 27 Hen. VIII. represents and supplies the part of the feoffees, which is well seen by 28 Hen. VIII., where the case is that baron and feme were jointly in of an use before the statute, and *in præcipe* brought after the statute against the baron alone, he pleaded joint tenancy with his wife: the court said he ought to show the statute, as at common law he should have shown by what feoffment [they held.] The statute therefore succeeds in office to the feoffees. Wherefore my first conclusion is this: that which the feoffees could not execute before the statute by conveyance, the statute does not execute by ordinance. Than this ground nothing can be more sensible or reasonable. Then at common law, if the feoffees [1] had an absolute use in fee simple, the feoffees could execute the fee simple in possession: if one had a particular use with divers remainders thereof, if all in remainder agreed, the feoffees could execute the estate accordingly. But on the other part if one had a contingent use, could the feoffees execute this use? No. For not only are they not compellable by subpœna, but moreover if they were willing, they could not do it by any device in law. Wherefore if the feoffees could not execute this before the statute, no more does the statute after: but when the contingent use comes *in esse*, at which time the feoffee can execute it, the statute wakes it.

2. As a second conclusion it is to be noted that, as it is a common and yet a good learning that the statute *de donis conditionalibus* changes not the law as to the creation of estates tail, but only for their preservation, so this statute of 27 Hen. VIII. alters not the law as to raising of uses, but only to draw the possession after them. Wherefore if a contingent use could not rise at common law if the possession

[1] I think "*cestuy que use*" would make better sense. As to the whole paragraph see Note D. to the *Reading*, p. 450.

of the feoffees was estranged without regress, so no more can it at this day: for the statute leaves all questions of rising of an use merely to the common law, and makes no alteration.

Now come we to the preamble, from which the lawyers of this realm are wont always to take light. And whereas a wise man has said, *nil ineptius lege cum prologo, jubeat non disputet;* this had been true if preambles were annexed as pleading for the provisions of laws; for the law carries authority in itself: but our preambles are annexed for exposition; and this gives aim to the body of the statute; for the preamble sets up the mark, and the body of the law levels at it.

And I confess when I heard Mr. Attorney argue so strongly out of the preamble, I objected within myself that it was but a fallacy, and that it was the equivocation of the word "use"; for the word "use" against which this statute and others inveigh signifies a thing which stood by itself and divided and severed from the possession, which was the cause of the mischief and fraud: and now since this statute there is no such thing; there remains only a conveyance, but the use severed is merely extinct. And because this objection is colourable,—that this statute and others more ancient intend only uses severed,—we must examine whether all the mischiefs which the statute recites of severed uses may not be verified of contingent uses.

The mischiefs are eight in number.

The first is the passing of the land without the solemnity and evidence of instruments, by mere words, signs, and tokens. A man makes a feoffment, not to the use of his last Will, like the case vouched by the Countess of Shrewsbury,—for that perchance would be nugatory and the ancient use continue,—but he limits certain uses and afterwards says that if by his last Will, (and he says not in writing) he declares new uses, the first uses shall cease, and the seisin shall be to these new uses: now shall these uses rise well by parol or Will nuncupative.

In like manner if he insert a clause, that if he delivers on his deathbed the ring he commonly wears on his finger to any one, that the first uses shall be determined and the seisin shall be to the use of him to whom he delivers it: now on the delivery of the ring lands pass by signs and tokens.

The second mischief in the statute is the disinheriting of heirs, which is a thing of great moment; for the disposition of the land after death is to the heir according to the law, and

other dispositions are of humour and respect, and though the law of 32 Hen. VIII. *de voluntatibus* favour voluntary dispositions, yet it leaves a third part to the heir; but if a feoffment be made, as in the cases before put, the heir shall have nothing.

The third mischief in the preamble is the depriving of the lords of their benefit of ward. A man makes a feoffment to the use of his first son, and after to the second and the third, and dies, they being within age; now shall his first son be in ward, for it is a feoffment within the statute of 32 Hen. VIII.; but if the eldest son come to full age and die without issue, then will the second son not be in ward, for he comes in as purchaser. This child begins to thrive betimes and purchases his father's land; and so by this fiction of law the lord is defrauded of his ward.

The fourth mischief in the preamble is the uncertainty of assurances to purchasers, which is the most general complaint. For although a man take all the most binding assurances, as fine, feoffment, recovery, warranty; yet the sleight of the contingencies slips from them all: and if he think to be sure by procuring all to join who have an interest, yet this helps not; for how can one join who will be born several years after. And if all the land in the realm were in such conveyances all would be as in mortmain,—no change, no intercourse; but we should have the faction which troubles divers states of *novi cives et veteres cives;* for lands should rest in certain families, and others could be but their farmers.

The fifth mischief is the uncertainty of tenants to the *præcipe*. A man makes a feoffment to the use of J. D., and if J. S. pay such a sum then to the use of J. S.; a stranger who has *eigne* right to the land brings *præcipe* against J. D. J. S. pays the money: the tenancy is gone, and if he pursue his recovery all is void. But had this been a condition at common law, there an entry would have been necessary, of which the plaintiff could have notice; but this use not only takes away the tenancy but steals it without overt act, merely by operation of law.

The sixth mischief is the loss of tenancy by curtesy and dower.

If such a perpetuity be created where the issue successively enjoys the estate for life only by way of use, now clearly there is no tenancy by curtesy or dower. If the limitation gives an

estate tail with restraint according to the usual form, yet there will be no jointure if express liberty be not left to make it. And a greater mischief than all these is, that husbands and wives will not only be deceived of their expectations, but if the estate be actually executed it will be devested, which is a greater prejudice: for if the heir aliene, the estates of curtesy and dower are gone, by reason that he who comes in by the contingent use comes paramount to the incumbrances, — not like him in remainder, but like him who comes in by condition. And the clause "that it shall be as if the person living were naturally dead" does not help this: it is against the principles of law that any one who comes in by limitation or condition should come in with a saving of any particular estate.

The seventh mischief is the perjury in trials of such secret conveyances; because it is a good rule *sine fide instrumentorum perit fides testimoniorum:* for these close and unpublished conveyances ever bring forth corrupt and perjured trials. And the extremity of this mischief does not yet appear, because the [existing] conveyances, for the most part, are fresh in memory: but when passage of time has obliterated their memory, it will be a labyrinth of uncertainties and so continual occasion of false oaths.

The eighth mischief is the damage the Crown sustains in attainders. *Hac conditione vivitur:* all subjects hold their lives as well as their lands and goods on condition that they commit not certain crimes prohibited; and if they infringe the conditions the law resumes one and the other. But now life, which is the greater, remains subject to the law, but the land, which is the less, is delivered; and the traitor shall be executed, yet the statute executes the use for the land; and whereas men were accustomed to fly for treason, now the land flieth. And so it is plain that all the mischiefs which the statute intended arise as strongly, and more so, on contingent uses, as on severed uses.

And besides all this we must look to the nature of this preamble; that is not a bare preamble standing by itself, but is made a limb of the act: and the joint which unites them is the clause "for the extirping and extinguishing of all such practices;" where the word "such" incorporates the preamble in the act itself.

Now come we to the body of the act; wherein I will take

this ground, *ex omnibus verbis eliciendus est sensus qui singula interpretatur.*

First it is to be proved by three parts in the act that the intent of Parliament was that such conveyances shall not be put in ure. The first is that the statute says, "for the extirpation of such feoffments, fines, recoveries, &c.," and says not for the extirpation of such uses, but for the rooting out of such conveyances. So the scope of the statute was not only to quench the uses by the induction of the possession, but to root out the nature of the assurance. The second is the saving; which says saving the right of all strangers before the making of the act, and not after; as is to be noted in Amy Townsend's case. Yet I am not of Mr. Attorney's mind that upon a feoffment to uses at this day all rights of strangers are gone; but I conceive that he said that *in terrorem*, to be more vehement against uses. For the difference is clear, that if an act of Parliament gives me such a piece of land, the right of all men without a saving passes[1] *inclusivè*; but if an act of Parliament gives me the estate of such an one in such lands, there is no need of any saving, for the gift is qualified by the reference: and this statute gives the estate of the feoffees, and therefore this saving is more than needs, and is only added in *abundantem cautelam;* yet it suffices to show the intent of the statute, which presumes that no such conveyance should be made after; and to this purpose I have alledged it. The third is the proviso that *cestui que use* should have this benefit of things in privity, as conditions, vouchers, and actions, *viz.* such as have their estate executed before such a day and not after. And upon this, as upon the last clause, I will not dispute whether *cestui que use* shall have such benefits at this day, and it is possible that the general words which give the estate of the feoffees will carry[2] this; but it suffices that the law reaches no favour to estates executed since; which shows that it was intended that such conveyances should be discontinued. And if any one object, to what purpose serve the words which you may find in divers places of the statute, "who are seised or hereafter shall be seised," I hold these words effectual in regard of uses discontinued; which after the entry of the feoffees may be revived, and so the seisins to the use be subsequent to the statute.

[1] The MS. has "é release."

[2] The word in the MS. looks like "bar."

And it will be said, intend you then to overthrow all feoffments to uses as well present as contingent? For this reason, that the statute intends to extirp the very conveyance, takes away as well the one as the other. To which I answer, nothing less; for there is no prohibitory clause in the statute for disabling the conveyance itself. But it suffices to show that the statute favours it not, and therefore in words dubious it is necessary to embrace the intention of the statute. And it is moreover to be retained in memory that present uses could at common law be executed by the feoffees, and not contingent uses: present uses participate not in the inconveniencies of the preamble, contingent uses participate in all: present uses have never been called in question, contingent uses have. But now I will show more direct matter of difference between them, and for the better explanation thereof, it is necessary to consider uses at Common Law in four qualities.

1. Use in possession.

2. Use in remainder.

3, Use on condition subsequent, as if a man had granted his use on condition; and

4. Use on a limitation or condition precedent, as the uses upon which the question is.[1]

The two former are allowed to be executed by the statute, and not the two latter. And this is proved by three places in the statute.

The first is in the fundamental clause of the statute which defines the subject, and shows the uses with which the statute will not meddle. The words are, "all and every such persons who have or hereafter shall have any such use, confidence, or trust in fee simple, fee tail, or for life, or years, or otherwise;" all this is of uses in possession. The statute proceeds, "or any confidence or trust in remainder or reversion." But yet the statute has not any such words as any use, confidence, or trust in possibility, or limitation, or otherwise, or in any other such manner. So the statute stays and rests at uses in remainder and reverter and descends no lower. For as, if a statute commence with the lesser, you can never intend the greater,—as, if it commence with dean, you must not intend a bishop;—so, for the same reasons, where it desists and breaks off at

[1] See Reading, p. 438.

the greater you must not understand the lesser. And this makes out the case if there were nothing else.

The second place of the statute are the words which follow immediately after the others, "shall be deemed and adjudged in lawful estate, seisin, and possession." The words are transposed; for possession refers to present uses, seisin and estate to remainder: for one may be seised of a remainder, and so a man may be said to have estate in a remainder. But none of these can be said of a possibility or interest contingent. And of seisin this is clear: of an estate it is more doubtful, yet not much. For a man is always said to be estated of that which he can give; and if I have a condition, and I grant all my estate to the ter-tenant, it does not extinguish my condition.

But it will be said that the word "estate" is a word ambiguous, and signifies sometimes the quantity or continuance, as fee simple, fee tail, for life or for years; sometimes it signifies the substance of the interest. But it is to be shown infallibly that in this case it cannot be taken for the former but for the latter, by the words which follow, "of and in such like estate as they have or shall have." In this second place it is taken in the former construction, which will be a vain tautology and repetition if the words were so taken in the former place; for if one took away the words adjoining, which cast a shadow between the matter [before and after,] the text amounts to this, that they shall be adjudged in lawful estate of such estate, &c., whereby it evidently appears that the word estate goes first to substance, and after to quantity: so possibility is excluded. This observation requires attention, as all subtilties of words do; but being rightly considered, it is plain enough.

The third place of the statute is before the others: that "where any persons stand or be seised to the use &c." And upon these words it has been ruled, that an use upon a term is not executed by the statute, nor yet an use discontinued. And for the same reason no more is an use contingent: for the seisin is not to such use until the contingency be performed. And for that which has been objected, that the use is in the keeping of the law, and that nothing is in the feoffees; it is true that the use is preserved by the law, but not executed by the statute before the time. And therefore it appears by evident demonstration, that an interest remains in the feoffees: a fee

simple absolute is passed to the feoffees in possession, only a fee simple defeasable is executed by the statute, as is proved: if then the lesser estate be subtracted and deducted out of the greater, it is of necessity that a surplusage remains. For put this case, that a contingent use was limited to the feoffees themselves; as if I enfeoff J. S. to the use of J. D. and his heirs, so long as J. B. has issue of his body, and after to the use of J. S. himself, the feoffee; now if the limitation or condition comes *in esse*, the use limited to J. D. ceases, and J. S. the feoffee does not take by way of use, but by residue of estate given by livery and not taken away by any use. In like manner is it if a new contingent use had been limited; the feoffees would still take first the residue of the estate after the first use determined, and then in the very same instant the new use is executed as at the first livery. And this is the medium between the two estates; and if the first *cestui que use* be disseised and continue disseised, and the limitation is [accomplished][1], the first use ceases, and the second cannot rise by reason of the removing of the possession out of privity. And so the feoffees come to have right, and can enter or bring their writ of right; but after they have reentered or recovered, the use now takes the possession from them. But in our case the feoffees are disabled by their own feoffment. And as for the word "clearly" in the statute, it is restrained by these words, "quality and form as he hath the use," and is to be understood for so much as the statute executes.

Thus as to the body of the statute, as well by way of proof as by way of explanation, I think enough has been said. But if the statute were not clear on my side, as I have made it apparent that it is, but only ambiguous,—in which case that construction ought to be taken which is less mischievous,—I think it fit to consider the mischiefs or inconveniences, which are in their sorts:

First, the evacuating and frustrating of divers notable and profitable statutes.

Secondly, the causing of divers effects and consequents in the policy of the state.

Thirdly, the producing of divers intricate indissoluble questions.

[1] This is the best guess I can make at a word which is obviously corrupt in the MS.

For the first, *leges cum sint vincula societatis non debent esse inter se dissociabiles.* But this law of 27 H. VIII. expounded for the upholding of these perpetuities, is as a *lupus legum*, a wolf or canker which devours the other laws.

The statute of 26 H. VIII. ordains that all persons seised of any estate of inheritance, shall forfeit it for treason. But by this device, a man shall have an inheritance and not forfeit it.

The statute of Fines in 4 H. VII. and 32 H. VIII., ordains and intends that fines shall be a bar to the issue. But by this device, inasmuch as the issue comes in by new limitation as purchaser, the fine in this case shall not be a bar.

The statute of 32 H. VIII. of Wills, requires that all testaments concerning lands shall be in writing. But by this device, as the case is put before, with limitations of uses and proviso to alter them by will, a declaration by way of devise shall be good without writing.

The statute of 32 H. VIII. c. 28. concerning leases, provides that the farmers shall enjoy their reasonable leases, such as the statute qualifies, against all those who have any estate of inheritance. But by this device lands so entailed, if they have not express liberty given by their conveyances, cannot make such leases, nor shall the farmers enjoy them.

The prerogative of the King, not by statute but by common law, permits not that a thing shall be devested out of the Crown, but by ways convenient and decent for the royal Majesty; that is, by petition, or matter of record, or such like means. But by this means contingent uses are executed out of the possession of the King, and snatch the possession without any ceremony or circumstance, as well as in the case of a common person; and so there is prejudice not only to the royal rights of the prerogative, but also to the honour of the possession of the King. And so it appeareth what a breach it makes in the provisions of divers laws.

As for the inconveniences in the common wealth, (*nam leges tam prudentiam debent politiis quam æquitatem privatis,*) Mr. Atkinson has granted this inconvenience with two colours of commendation:

First that it is a wisdom and foresight for every man to imagine of that which may happen to his posterity, and by all ways establish his name. To this I answer that it is a wisdom, but a greater than even Solomon aspired after, who had a

large heart as the Scripture saith. For I find that he uses other language where he says that he must leave the fruit of his labour to one of whom he does not know if he shall be a fool or a wise man. And yet does he say that he shall be but an usufructuary or tenant restrained in a perpetuity? No; but the absolute lord of all that he had by his travail. So little did he know of these establishments; but reputed it a condition of mortality wherein it befits all men to rest, and not to swell in mind to catch at the prerogatives of heaven, which are permanent, and instability here below. Therefore no need *altum sapere, sed sapere ad sobrietatem*, and if one see his son and heir that is *in esse* to be of bad disposition, it is enough to bind him that he shall not alienate; and for that there are other good means without this immoderate restraint which extends in perpetuity.

The other commendation was that the times may be such as before have been in regard of civil and intestine wars, when all the subjects of the land shall be traitors [by the *will he n'ill he*][1], and treason shall be a captious crime: in which time it were pity that no refuge should be left to preserve great and noble houses; so that although the persons and lives of men incur peril according to the nature and fortune of the time, yet their posterity and lineage should not be merely ruinated. To this I answer that I think and hope that I shall never see such a time, and my sight is too dim and my prospect too short to foresee it; but such foreseeing men may likewise foresee this with the rest,—that if force prevail above lawful regiment, how easy it will be to procure an act of Parliament to pass according to the humour and bent of the State, to sweep away all these perpetuities which are already slandered and discredited; and so no such relief in those times according to their supposal.

But in the meantime without these far reaches, we should consider the perils immanent in the present estate; who see in this time the desperate humours of divers men in devising treason and conspiracies; who being such men that, in the course of their ambition or other furious apprehensions, they make very small or no account of their proper lives; if to the common desire and sweetness of life the natural regard for their posterity

[1] This is a very conjectural rendering of the MS.

be not adjoined, the bridle, I doubt, will be too weak: for when they see that whatever comes of themselves, yet their posterity shall not be overthrown, they will be made more audacious to attempt such matters.

Also another reason of State may be added, which I shall but touch, knowing that I speak before grave and wise persons: and that is the peril which necessarily grows to any State, if greatness of men's possessions be in discontented races; the which must necessarily follow if, notwithstanding the attainder of the father, the son shall succeed in his line and estate.

But omitting these considerations of state and civil policy, let us come to considerations of humanity.

A man is taken prisoner in war. Life and liberty are more precious than lands or goods. For his ransom it is necessary for him to sell. If then he be shackled in such conveyances, he is as much captive to his conveyances as to his enemy, and so must die in misery to make his son and heir after him live in jollity.

Some young heir when he first comes to the float of his living outcompasseth himself in expenses; yet perhaps in good time reclaims himself, and has a desire to recover his estate; but has no readier way than to sell a parcel to free himself from the biting and consuming interest. But now he cannot [redeem] himself with his proper means, and though he be reclaimed in mind, yet can he not remedy his estate.

So, passing over the considerations of humanity, let us now consider the discipline of families. And touching this I will speak in modesty and under correction. Though I reverence the laws of my country, yet I observe one defect in them; and that is, there is no footstep there of the reverend *potestas patria* which was so commended in ancient times. A man can sue his father; he can be a witness against his father; the father cannot intermeddle with the goods of his son; [the son] is not bound by the law to grant maintenance to his father if he does not choose: if [indeed] the father be killed by the son, which is a case rare and monstrous, he shall be drawn on a hurdle; but in other cases the father and son are as strangers. This only yet remains: if the father has any patrimony and the son be disobedient, he may disherit him; if he will not deserve his blessing he shall not have his living. But this device of perpetuities has taken this power from the

father likewise; and has tied and made subject (as the proverb is) the parents to their cradle, and so notwithstanding he has the curse of his father, yet he shall have the land of his grandfather. And what is more, if the son marry himself to a woman diffamed, so that she bring bastard slips and false progeny into the family, yet the issue of this woman shall inherit the land, for that the first perpetuator will have it so, who is dead a long time before. And these are the bad effects, besides those of fraud and deceit. And I well know a difference between speaking in the Parliament and before the judges in an argument of law.

Touching the third inconvenience, which is of perplexed and obscure questions; it is a good principle, *in obscuris quod minimum est sequamur.* Let the law be guide so far as possibly it can be, and make the fewest questions; *nam quod certum non est justum non est.* And if you look at the case of Earl and Snow in Plowd. Comm. and Delamer's case, you will find the principal reason of the judgment to be no other than this: for it is said, if it were otherwise, many perplexed and intricate questions would arise. Now if this clause which is put in perpetuities be considered, that is to say, that the land shall remain upon forfeiture to him who is next in limitation, as if the other committing the forfeiture were dead, it is not possible for the most learned judge in the land to answer the questions. For there will be heirs without death, the which is a thing prodigious in our law, and is a common highway to many subtle questions; and though there be a like clause of fiction in some statutes, as in the statute of 11 H. VII. it is necessary to note a difference: for statutes can dispense with the grounds of law, which stoops to them and is controlled by them: but no such power have the words of a deed.

But admitting all these inconveniences, says Mr. Atkinson, if you overthrow these perpetuities in uses, yet will there be new devices to do the like by way of possession. Which I do not see how it can be done, for that the grounds of conveyances in possession are more strict; and *secundi surculi fraudum minus periculosi.* When men see that this device shall be overthrown, they will have little courage to invent the like. And I doubt not but that there will be new attempts of fraud, but it will be long before they grow to such extremity as it is now. And as for the making of like restraints by Will, it is to

be noted, though the case of Scholastica be now law, yet if you adjudicate against perpetuities the law will change in the case of Wills, necessarily and by consequence of reason; *quia forma juris condonatur testamentis, non substantia juris.* The law grants this favour to testaments, for the suddenness with which men may be surprised, when they cannot call counsel, and at this time being in agony and conflict of sickness, that they cannot [ex]press themselves formally; but to say that the Will shall be as an act of Parliament, to do a thing which is impossible to be done in substance and intent by any form of conveying, carries no sense; and therefore by disabling of this conveyance you also disable the others.

There are also two other inconveniences which I myself have objected. These I will answer and so conclude.

The one is that if possession in privity be necessary when a future use is executed, it is dangerous for bargains and sales, which are the common assurance of the land: for if there be disseisin or dower at the time of the enrolment, it may be said this shall be a discontinuance of the use. The answer is easy: this use differs from the contingent use, for that this use is but arrested by the statute and after passes as *ab initio.*

The other is that the favourable clause which is in divers assurances [will be nugatory]; which is that, after a covenant to execute acts of assurance, it is also covenanted between the parties upon good consideration that if those acts shall not be lawfully executed, or if errors happen to be in them, that then the grantor shall be seised to the same uses; which clause is very beneficial for security of estates, and cures many defects.

But to this and other like inconveniences this one answer is sufficient: That contingent uses are not directly overthrown if the feoffees do nothing to bar themselves, but still preserve their right. And the said feoffees in special cases which pretend favour may be enjoined out of Chancery, where uses always have been ordered, that they shall not do any act to the prejudice of the use which may thereafter arise, and the subpœna in this case be revived.

Therefore I conclude, for that the true intent of the statutes of 27 H. VIII. warrants it, that it is sufficiently clear in itself, and is not swayed by any contrary authority on the other side, but much swayed by the consideration of the inconveniences on this side, that the use must not rise in John Chidley.

CASE OF THE POST-NATI.

PREFACE.

THIS argument was first printed in 1641, together with two of Bacon's speeches in Parliament on the union, "by the author's copy." There is a copy in the British Museum, (King's MSS. 17A. LVI. p. 262.) corrected by Bacon.

It was delivered in *Calvin's Case* (reported by Coke, 7 Rep. 1.), before Easter Term, 1608, in the Exchequer Chamber, whither an Assize by Calvin and a Chancery suit for discovery of evidence had been adjourned from the King's Bench and the Chancery respectively.

Bacon insists on its being "no feigned case," though "used by His Majesty to give an end to this question:" but, however real the disseisors Richard and Nicholas Smith may have been, one can hardly doubt that the proceedings were from the beginning concerted with the Crown.

The Commissioners appointed under 2 Jac. c. 2. to treat of the Union of England and Scotland had recommended[1], *inter alia*, an act to declare that, by the Common Law, natives of either kingdom born after James's accession to the Crown of England were naturalised in both. The Commons not assenting, committees of both Houses met February 25th, 1606-7, Bacon being the spokesman of the Commons to introduce the subject, and Common Lawyers, Civilians, and others following in parts assigned to them. The Lords called on the Judges for their advice; and on the 26th, Popham, Coke, and Fleming, the three chiefs, and seven others gave their opinion in favour of the Postnati, Walmsley being the only dissentient: the Chancellor Ellesmere had in the conference shown his inclination to agree with the majority.

The Commons remained unconvinced and would not pass any declaratory act (H. C. journ. 28° March *et passim*), and the

[1] Moore, Rep. 790.

opinions of the Judges were not as efficacious as a judgment for settling the question.[1]

On the 29th of October, after the close of the session, the plaintiff in this case, an infant born since James's accession, received a grant of the lands in question, which had become forfeited by an attainder[2]; and the writ herein is tested 3rd November, four days after. I suppose the Chancery suit was added for the purpose of having a decision binding every possible tribunal.

Popham had died in the interval. The other Judges who had already delivered opinions in the House of Lords retained them on this occasion, and of the five additional voices four were on the same side, Foster alone going with Walmsley. I believe we have only Coke's summary of the judgment at Common Law: Lord Ellesmere published his own in a pamphlet, which is reprinted in the State Trials, Vol. II.

[1] See Lord Ellesmere's judgment.

[2] Docket in State Paper Office.

THE ARGUMENT

OF SIR FRANCIS BACON, KNIGHT,

HIS MAJESTY'S SOLICITOR-GENERAL,

IN THE CASE OF THE POST-NATI OF SCOTLAND,

IN THE EXCHEQUER CHAMBER,

BEFORE THE LORD CHANCELLOR, AND ALL THE JUDGES OF ENGLAND.

May it please your Lordships,

THIS case your lordships do well perceive to be of exceeding great consequence. For whether you do measure it by place, it reacheth not only to the realm of England, but to the whole island of Great Britain; or whether you measure it by time, it extendeth not only to the present time, but much more to future generations,

Et nati natorum, et qui nascentur ab illis:

And therefore as it is to receive at the bar a full and free debate, so I doubt not but it shall receive from your lordships a sound and just resolution according to law, and according to truth. For, my lords, though he were thought to have said well, that said it for his word, *Rex fortissimus;* yet he was thought to have said better, even in the opinion of the king himself, that said, *Veritas fortissima, et prævalet.*

And I do much rejoice to observe such a concurrence in the whole carriage of this cause to this end, that truth may prevail. The case no feigned or framed case; but a true case between true parties: The title handled formerly in some of the king's

courts, and freehold upon it; used indeed by his Majesty in his high wisdom to give an end to this great question, but not raised; *occasio*, as the schoolmen say, *arrepta, non porrecta:* The case argued in the king's bench by Mr. Walter with great liberty, and yet with good approbation of the court: The persons assigned to be of counsel on that side, inferior to none of their quality and degree in learning; and some of them most conversant and exercised in the question: The judges in the king's bench have adjourned it to this place for conference with the rest of their brethren: Your lordship, my lord chancellor, though you be absolute judge in the court where you sit, and might have called unto you such assistance of judges as to you had seemed good, yet would not forerun or lead in this case by any opinion there to be given; but have chosen rather to come yourself to this assembly:—all tending, as I said, to this end, whereunto I for my part do heartily subscribe, *ut vincat veritas*, that truth may first appear, and then prevail. And I do firmly hold, and doubt not but I shall well maintain, that this is the truth, that Calvin the plaintiff is *ipso jure* by the law of England a natural born subject to purchase freehold, and to bring real actions within England.

In this case I must so consider the time, as I must much more consider the matter. And therefore though it may draw my speech into farther length; yet I dare not handle a case of this nature confusedly, but purpose to observe the ancient and exact form of pleadings; which is,

First, to explain or induce.

Then, to confute, or answer objections.

And lastly, to prove, or confirm.

And first for explanation. The outward question in this case is no more, but, Whether a child, born in Scotland since his Majesty's happy coming to the crown of England, be naturalised in England, or no? But the inward question or state of the question evermore beginneth where that which is confessed on both sides doth leave.

It is confessed, that if these two realms of England and Scotland were united under one law and one parliament, and thereby incorporated and made as one kingdom, that the *Post-natus* of such an union should be naturalized.

It is confessed, that both realms are united in the person of

our sovereign; or, because I will gain nothing by surreption in the putting of the question, that one and the same natural person is king of both realms.

It is confessed, that the laws and parliaments are several.

So then, Whether this privilege and benefit of naturalization be an accessory or dependency upon that which is one and joint, or upon that which is several, hath been, and must be the depth of this question. And therefore your lordships do see the state of this question doth evidently lead me by way of inducement to speak of three things: The king, the law, and the privilege of naturalization. For if you well understand the nature of the two principals, and again the nature of the accessory; then shall you discern, to whether principal the accessory doth properly refer, as a shadow to a body, or iron to an adamant.

And here your lordships will give me leave in a case of this quality, first to visit and open the foundations and fountains of reason, and not begin with the positions and eruditions of a municipal law; for so was it done in the great case of the mines; and so ought it to be done in all cases of like nature. Plowd. And this does not at all detract from the sufficiency of our laws, as incompetent to decide their own cases, but rather addeth a dignity unto them, when their reason appearing as well as their authority doth shew them to be as fine monies, which are current not only by the stamp, because they are so received, but by the natural metal, that is, the reason and wisdom of them.

And master Littleton himself in his whole book doth commend but two things to the professors of the law by the name of his sons; the one, the inquiring and searching out the reasons of the law; and the other, the observing of the forms of pleadings. And never was there any case that came in judgment that required more that Littleton's advice to be followed[1] in those two points, than doth the present case in question. And first of the king.

It is evident that all other commonwealths, monarchies only excepted, do subsist by a law precedent. For where authority is divided amongst many officers, and they not perpetual, but annual or temporary, and not to receive their authority but by election, and certain persons to have voice only to that election,

[1] So in MS. If not corrupt it must mean, as Mr. Spedding suggests to me, "that advice of Littleton."

and the like; these are busy and curious frames, which of necessity do pre-suppose a law precedent, written or unwritten, to guide and direct them: but in monarchies, especially hereditary, that is, when several families, or lineages of people do submit themselves to one line, imperial or royal, the submission is more natural and simple; which afterwards by laws subsequent is perfected and made more formal, but it is grounded upon nature.

That this is so, it appeareth notably in two things; the one the platforms and patterns which are found in nature of monarchies; the other the original submissions, and their motives and occasions. The platforms are three:

The first is that of a father, or chief of a family; who governing over his wife by prerogative of sex, over his children by prerogative of age, and because he is author unto them of being, and over his servants by prerogative of virtue and providence (for he that is able of body, and improvident of mind, is *natura servus*) is the very model of a king. So is the opinion of Aristotle, lib. iii. *Pol.* cap. 14. where he saith, *Verum autem regnum est, cum penes unum est rerum summa potestas: quod regnum procurationem familiæ imitatur.* And therefore Lycurgus, when one counselled him to dissolve the kingdom, and to establish another form of estate, answered, "Sir, begin to do that which you advise first at home in your own house:" noting, that the chief of a family is as a king; and that those that can least endure kings abroad, can be content to be kings at home. And this is the first platform, which we see is merely natural.

The second is that of a shepherd and his flock, which, Xenophon saith, Cyrus had ever in his mouth. For shepherds are not owners of the sheep; but their office is to feed and govern: no more are kings proprietaries or owners of the people: for God is sole owner of people. *The nations,* as the Scripture saith, *are his inheritance*: but the office of kings is to govern, maintain, and protect people. And it is not without a mystery, that the first king that was instituted by God, David, (for Saul was but an untimely fruit,) was translated from a shepherd, as you have it in Psalm lxxviii. *Et elegit David servum suum, de gregibus ovium sustulit eum, — pascere Jacob servum suum, et Israel hæreditatem suam.* This is the second platform; a work likewise of nature.

The third platform is the government of God himself over the world, whereof lawful monarchies are a shadow. And therefore both amongst the Heathen, and amongst the Christians, the word, sacred, hath been attributed unto kings, because of the conformity of a monarchy with a divine Majesty: never to a senate or people. And so you find it twice in the lord Coke's Reports; once in the second book, the bishop of Winchester's case; and his fifth book, Cawdrie's case; and more anciently in the 10 of H. VII. fol. 18. *Rex est persona mixta cum sacerdote;* an attribute which the senate of Venice, or a canton of Swisses, can never challenge. So, we see, there be precedents or platforms of monarchies, both in nature, and above nature; even from the monarch of heaven and earth to the king, if you will, in an hive of bees. And therefore other states are the creatures of law: and this state only subsisteth by nature.

For the original submissions, they are four in number: I will briefly touch them. The first is paternity or patriarchy, which was when a family growing so great as it could not contain itself within one habitation, some branches of the descendants were forced to plant themselves into new families, which second families could not by a natural instinct and inclination but bear a reverence, and yield an obeisance to the eldest line of the ancient family from which they were derived.

The second is, the admiration of virtue, or gratitude towards merit, which is likewise naturally infused into all men. Of this Aristotle putteth the case well; when it was the fortune of some one man, either to invent some arts of excellent use towards man's life, or to congregate people, that dwelt scattered, into one place, where they might cohabit with more comfort, or to guide them from a more barren land to a more fruitful, or the like: upon these deserts, and the admiration and recompense of them, people submitted themselves.

The third, which was the most usual of all, was conduct in war, which even in nature induceth as great an obligation as paternity. For as men owe their life and being to their parents in regard of generation, so they owe it also to saviours in the wars in regard of preservation. And therefore we find in chap. xviii. of the book of Judges, ver. 22. *Dixerunt omnes viri ad Gideon, Dominare nostri, tu et filii tui, quoniam servasti nos de manu Madian.* And so we read when it was brought

unto the ears of Saul, that the people sung in the streets, *Saul hath killed his thousand, and David his ten thousand* of enemies, he said straightways: *Quid ei superest nisi ipsum regnum?* For whosoever hath the military dependence, wants little of being king.

The fourth is an inforced submission, which is conquest, whereof it seemed Nimrod was the first precedent, of whom it is said; *Ipse cœpit potens esse in terra, et erat robustus venator coram Domino.* And this likewise is upon the same root, which is the saving or gift as it were of life and being. For the conqueror hath power of life and death over his captives; and therefore where he giveth them themselves, he may reserve upon such a gift what service and subjection he will. All these four submissions are evident to be natural and more ancient than law.

To speak therefore of law, which is the second part of that which is to be spoken of by way of inducement.

Law no doubt is the great organ by which the sovereign power doth move, and may be truly compared to the sinews in a natural body, as the sovereignty may be compared to the spirits: for if the sinews be without the spirits, they are dead and without motion; if the spirits move in weak sinews, it causeth trembling: so the laws, without the king's power, are dead; the king's power, except the laws be corroborated, will never move constantly, but be full of staggering and trepidation. But towards the king himself the law doth a double office or operation: the first is to intitle the king, or design him: and in that sense Bracton saith well, lib. 1. fol. 5. and lib. 3. fol. 107. *Lex facit quod ipse sit Rex;* that is, it defines his title; as in our law, That the kingdom shall go to the issue female; that it shall not be departable among daughters; that the half-blood shall be respected, and other points differing from the rules of common inheritance. The second is,—that whereof we need not fear to speak in good and happy times, such as these are,—to make the ordinary power of the king more definite or regular. For it was well said by a father, *plenitudo potestatis est plenitudo tempestatis.* And although the king, in his person, be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day.

But I demand, Do these offices or operations of law evacuate or frustrate the original submission, which was natural? Or

shall it be said that all allegiance is by law? No more than it can be said, that *potestas patria,* the power of the father over the child, is by law. And yet no doubt laws do diversely define of that also; the law of some nations having given the fathers power to put their children to death; others, to sell them thrice; others, to disinherit them by testament at pleasure, and the like. Yet no man will affirm, that the obedience of the child is by law, though laws in some points do make it more positive: and even so it is of allegiance of subjects to hereditary monarchs, which is corroborated and confirmed by law, but is the work of the law of nature. And therefore you shall find the observation true, and almost general in all states, that their lawgivers were long after their first kings, who governed for a time by natural equity without law: so was Theseus long before Solon in Athens: so was Eurytion *et* Sous long before Lycurgus in Sparta: so was Romulus long before the *Decemviri.* And even amongst ourselves there were more ancient kings of the Saxons; and yet the laws ran under the name of Edgar's laws. And in the refounding of the kingdom in the person of William the Conqueror, when the laws were in some confusion for a time, a man may truly say that king Edward I. was the first lawgiver, who, enacting some laws and collecting others, brought the law to some perfection. And therefore I will conclude this point with the stile which divers acts of parliaments do give unto the king: which term him very effectually and truly, "our natural sovereign and liege lord." And as it was said by a principal judge here present when he served in another place, and question was moved by some occasion of the title of Bullein's lands, that he would never allow that queen Elizabeth (I remember it for the efficacy of the phrase) should be a statute Queen, but a common-law Queen: so surely I shall hardly consent that the King shall be esteemed or called only our rightful sovereign, or our lawful sovereign, but *our natural liege sovereign;* as acts of parliament speak: for as the common law is more worthy than the statute law; so the law of nature is more worthy than them both.

Having spoken now of the king and the law, it remaineth to speak of the privilege and benefit of naturalization itself; and that according to the rules of the law of England.

Naturalization is best discerned in the degrees whereby the law doth mount and ascend thereunto. For it seemeth ad-

mirable unto me, to consider with what a measured hand and with how true proportions our law doth impart and confer the several degrees of this benefit. The degrees are four.

The first degree of persons, as to this purpose, that the law takes knowledge of, is an *alien enemy;* that is, such a one as is born under the obeisance of a prince or state that is in hostility with the king of England. To this person the law giveth no benefit or protection at all, but if he come into the realm after war proclaimed, or war in fact, he comes at his own peril, he may be used as an enemy: for the law accounts of him, but, as the Scripture saith, as of a spy that comes to see the weakness of the land. And so is 2 Ric. III. fol. 2. Nevertheless this admitteth a distinction. For if he come with safe-conduct otherwise it is: for then he may not be violated, either in person or goods. But yet he must fetch his justice at the fountain-head, for none of the conduit pipes are open to him; he can have no remedy in any of the king's courts; but he must complain himself before the king's privy council: there he shall have a proceeding summary from hour to hour, the cause shall be determined by natural equity, and not by the rules of law; and the decree of the council shall be executed by aid of the chancery, as in 13 E. IV. And this is the first degree.

The second person is an *alien friend,* that is, such a one as is born under the obeisance of such a king or state as is confederate with the king of England, or at least not in war with him. To this person the law allotteth this benefit, that as the law accounts that the hold it hath over him is but a transitory hold, (for he may be an enemy,) so the law doth indue him but with a transitory benefit, that is, of movable goods and personal actions. But for freehold, or lease, or actions real or mixt, he is not enabled, except it be in *auter droit.* And so is 9 E. IV. fol. 7. 19 E. IV. fol. 6. 5 Mar. and divers other books.

The third person is a *denizen,* using the word properly, (for sometimes it is confounded with a natural born subject): This is one that is but *subditus insitivus,* or *adoptivus,* and is never by birth, but only by the king's charter, and by no other mean, come he never so young into the realm, or stay he never so long. Mansion or habitation will not indenize him, no, nor swearing obedience to the king in a leet, which doth in-law the subject; but only, as I said, the king's grace and gift. To this person

the law giveth an ability and capacity abridged, not in matter, but in time. And as there was a time when he was no subject, so the law doth not acknowledge him before that time. For if he purchase freehold after his denization, he may take it; but if he have purchased any before, he shall not hold it: so if he have children after, they shall inherit; but if he have any before, they shall not inherit. So as he is but privileged *a parte post*, as the schoolmen say, and not *a parte ante*.

The fourth and last degree is a *natural born subject*, which is evermore by birth, or by act of parliament; and he is complete and entire. For in the law of England there is *nil ultra*, there is no more subdivision or more subtle division beyond these: and therein it seemeth to me that the wisdom of the law, as I said, is to be admired both ways, both because it distinguisheth so far, and because it doth not distinguish farther. For I know that other laws do admit more curious distinction of this privilege; for the Romans had, besides *jus civitatis* which answereth to naturalization, *jus suffragii*. For although a man were naturalized to take lands and inheritance, yet he was not enabled to have a voice at passing of laws, or at election of officers. And yet farther they have *jus petitionis*, or *jus honorum*. For though a man had voice, yet he was not capable of honour and office. But these be the devices commonly of popular or free estates, (which are jealous whom they take into their number,) and are unfit for monarchies; but by the law of England, the subject that is natural born hath a capacity or ability to all benefits whatsoever: I say capacity or ability; but to reduce *potentiam in actum*, is another case. For an earl of Ireland, though he be naturalized in England, yet hath no voice in the parliament of England, except he have either a call by writ, or creation by patent; but he is capable of either. But upon this quadripartite division of the ability of persons I do observe to your lordships three things, being all effectually pertinent to the question in hand.

The first is, that if any man conceive that the reasons for the *Post-nati* might serve as well for the *Ante-nati*, he may by the distribution which we have made plainly perceive his error. For the law looketh not back, and therefore cannot by any *ex post facto*, after birth, alter the state of the birth; wherein no doubt the law hath a grave and profound reason; which is this, in a few words, *Nemo subito fingitur; aliud est nasci, aliud*

fieri: we indeed respect and affect more these worthy gentlemen of Scotland whose merits and conversations we know; but the law that proceeds upon general reason, and looks upon no men's faces, affecteth and privilegeth those which drew their first breath under the obeisance of the king of England.

The second point is, that by the former distribution it appeareth that there be but two conditions by birth, either *alien*, or *natural born*, (*nam tertium penitus ignoramus*). It is manifest then, that if the *Post-nati* of Scotland be not natural born, they are alien born, and in better no degree at all than Flemings, French, Italians, Spanish, Germans, and others, which are all at this time alien friends, by reason his Majesty is in peace with all the world.

The third point seemeth to me very worthy the consideration; which is, that in all the distributions of persons, and the degrees of abilities or capacities, the king's act is all in all without any manner of respect to law or parliament. For it is the king that makes an alien enemy, by proclaiming a war, wherewith the law or parliament intermeddle not. So the king only grants safe-conducts, wherewith law and parliament intermeddle not. It is the king likewise that maketh an alien friend, by concluding a peace, wherewith law and parliament intermeddle not. It is the king that makes a denizen by his charter, absolutely of his prerogative and power, wherewith law and parliament intermeddle not. And therefore it is strongly to be inferred, that as all these degrees depend wholly upon the king's act, and no ways upon law or parliament; so the fourth, although it cannot be wrought by the king's patent, but by operation of law, yet that the law, in that operation, respecteth only the king's person, without respect of subjection to law or parliament. And thus much by way of explanation and inducement: which being all matter in effect confessed, is the strongest ground-work to that which is contradicted or controverted.

There followeth the confutation of the arguments on the contrary side.

THAT which hath been materially objected, may be reduced to four heads.

The first is, that the privilege of naturalization followeth allegiance, and that allegiance followeth the kingdom.

The second is drawn from that common ground, *cum duo jura concurrunt in una persona, æquum est ac si essent in duobus;* a rule, the words whereof are taken from the civil law; but the matter of it is received in all laws; being a very line or rule of reason, to avoid confusion.

The third consisteth of certain inconveniences conceived to ensue of this general naturalization, *ipso jure.*

The fourth is not properly an objection, but a pre-occupation of an objection or proof on our part, by a distinction devised between countries devolute by descent, and acquired by conquest.

For the first, it is not amiss to observe that those who maintain this new opinion, whereof there is *altum silentium* in our books of law, are not well agreed in what form to utter and express it. For some say that allegiance hath respect to the law, some to the crown, some to the kingdom, some to the body politic of the king: so there is a confusion of tongues amongst them, as it commonly cometh to pass in opinions that have their foundations in subtlety and imagination of man's wit, and not in the ground of nature. But to leave their words, and to come to their proofs: they endeavour to prove this conceit by three manner of proofs: first, by reason; then, by certain inferences out of statutes; and lastly, by certain book-cases, mentioning and reciting the forms of pleadings.

The reason they bring is this; that naturalization is an operation of the law of England; and so indeed it is; that may be the true *genus* of it.

Then they add, that granted, that the law of England is of force only within the kingdom and dominions of England, and cannot operate but where it is in force: but the law is not in force in Scotland, therefore it cannot induce this benefit of naturalization by a birth in Scotland.

This reason is plausible and sensible, but extremely erroneous. For the law of England, for matters of benefit or forfeitures in England, operateth over the world. And because it is truly said that *respublica continetur pœna et præmio,* I will put a case or two of either.

It is plain that if a subject of England had conspired the death of the king in foreign parts, it was by the common law of England treason. How prove I that? By the statute of 35 H. VIII. cap. 2. wherein you shall find no words at all of

making any new case of treason which was not treason before, but only of ordaining a form of trial; *ergo*, it was treason before: and if so, then the law of England works in foreign parts. So of contempts, if the king send his privy seal to any subject beyond the seas, commanding him to return, and he disobey, no man will doubt but there is a contempt, and yet the fact inducing the contempt was committed in foreign parts. Therefore the law of England doth extend to acts or matters done in foreign parts.

So of reward, privilege or benefit, we need seek no other instance than the instance in question; for I will put you a case that no man shall deny, where the law of England doth work and confer the benefit of naturalization upon a birth neither within the dominions of the kingdom, nor king of England. By the statute of 35 E. III. which, if you will believe Hussey, is but a declaration of the common law, all children born in any parts of the world, if they be of English parents continuing at that time as liege subjects to the king, and having done no act to forfeit the benefit of their allegiance, are *ipso facto* naturalized. Nay, if a man look narrowly into the law in this point, he shall find a consequence that may seem at the first strange, but yet cannot be well avoided; which is, that if divers families of English men and women plant themselves at Middleborough, or at Roan, or at Lisbon, and have issue, and their descendants do intermarry amongst themselves, without any intermixture of foreign blood; such descendants are naturalized to all generations: for every generation is still of liege parents, and therefore naturalized; so as you may have whole tribes and lineages of English in foreign countries.

And therefore it is utterly untrue that the law of England cannot operate or confer naturalization, but only within the bounds of the dominions of England.

To come now to their inferences upon statutes, the first is out of this statute which I last cited. In which statute it is said, that in four several places there are these words, "born within the allegiance of England;" or again, "born without the allegiance of England," which, say they, applies the allegiance to the kingdom, and not to the person of the king. To this the answer is easy; for there is no trope of speech more

familiar than to use the place of addition for the person. So we say commonly, the line of York, or the line of Lancaster, for the lines of the duke of York, or the duke of Lancaster. So we say the possessions of Somerset or Warwick, intending the possessions of the dukes of Somerset or earls of Warwick. So we see earls sign, Salisbury, Northampton, for the earls of Salisbury and Northampton. And in the very same manner the statute speaks, allegiance of England, for allegiance of the king of England. Nay more, if there had been no variety in the penning of that statute, this collection had had a little more force; for those words might have been thought to have been used of purpose and in propriety; but you may find in other three several places of the same statute, allegiance and obeisance of the king of England, and especially in the material and concluding place, that is to say, children whose parents were at the time of their birth at the faith and obeisance of the king of England. So it is manifest by this indifferent and promiscuous use of both phrases, the one proper, the other improper, that no man can ground any inference upon these words without danger of cavillation.

The second statute out of which they infer, is a statute made in 32 Hen. VIII. ca. 16. touching the policy of strangers tradesmen within this realm. For the parliament finding that they did eat the Englishmen out of trade, and that they entertained no apprentices but of their own nation, did prohibit that they should receive any apprentice but the king's subjects. In which statute is said, that in nine several places there is to be found this context of words, "aliens born out of the king's obedience;" which is pregnant, say they, and doth imply that there be aliens born within the king's obedience. Touching this inference, I have heard it said, *qui hærit in litera, hæret in cortice;* but this is not worthy the name of *cortex*, it is but *muscus corticis*, the moss of the bark. For it is evident that the statute meant to speak clearly and without equivocation, and to a common understanding. Now then there are aliens in common reputation, and aliens in precise construction of law; the statute then meaning not to comprehend Irishmen, or Jerseymen, or Calaismen, for explanation-sake, lest the word alien might be extended to them in a vulgar acceptance, added those further words, *born out of the king's obedience.* Nay, what if we should say, that those words, according to the re-

ceived laws of speech, are no words of difference or limitation, but of declaration or description of an alien, as if it had been said, with a *videlicet*—aliens; that is, such as are born out of the king's obedience? they cannot put us from that construction. But sure I am, if the bark make for them, the pith makes for us; for the privilege of liberty which the statute means to deny to aliens of entertaining apprentices, is denied to none born within the king's obedience, call them aliens or what you will. And therefore by their reason, a *Post-natus* of Scotland shall by that statute keep what stranger apprentices he will, and so is put in the degree of an English.

The third statute out of which inference is made, is the statute of 14 E. III.[1] *cap. solo*, which hath been said to be our very case; and I am of that opinion too, but directly the other way. Therefore to open the scope and purpose of that statute: after that the title to the crown of France was devolute to K. E. III. and that he had changed his title, changed his arms, changed his seal, as his Majesty hath done, the subjects of England, saith the statute, conceived a fear that the realm of England might become subject to the realm of France, or to the king as king of France. And I will give you the reasons of the double fear, that it should become subject to the realm of France. They had this reason of fear; Normandy had conquered England, Normandy was feudal of France, therefore because the superior seigniory of France was now united in right with the tenancy of Normandy, and that England, in regard of the conquest, might be taken as a perquisite to Normandy, they had probable reason to fear that the kingdom of England might be drawn to be subject to the realm of France. The other fear, that England might become subject to the king as king of France, grew no doubt of this foresight; that the kings of England might be like to make their mansion and seat of their estate in France, in regard of the climate, wealth, and glory of that kingdom; and thereby the kingdom of England might be governed by the king's mandates and precepts issuing as from the king of France. But they will say, whatsoever the occasion was, here you have the difference authorized of subjection to a king generally, and subjection to a king as king of a certain kingdom. But to this I give an answer three-fold:

[1] Stat. 5.

First, it presseth not the question; for doth any man say that a *Post-natus* of Scotland is naturalised in England, because he is a subject of the king as king of England? No, but generally because he is the king's subject.

Secondly, The scope of this law is to make a distinction between crown and crown; but the scope of their argument is to make a difference between crown and person.

Lastly, this statute, as I said, is our very case retorted against them. For this is a direct statute of separation, which presupposeth that the common law had made an union of the crowns in some degree, by virtue of the union of the king's person, if this statute had not been made to stop and cross the course of the common law in that point: as if Scotland now should be suitors to the king, that an act might pass to like effect, and upon like fears. And therefore if you will make good your distinction in this present case, shew us a statute for it. But I hope you can shew no statute of separation between England and Scotland. And if any man say that this was a statute declaratory of the common law, he doth not mark how it is penned; for after a kind of historical declaration in the preamble, that England was never subject to France, the body of the act is penned thus: "The king doth grant and establish;" which are words merely introductive *novæ legis*, as if the king gave a charter of franchise, and did invest, by a donative, the subjects of England with a new privilege or exemption, which by the common law they had not.

To come now to the book-cases which they put; which I will couple together, because they receive one joint answer.

The first is 42 E. III. fol. 9. where the book saith, exception was taken that the plaintiff was born in Scotland at Ross, out of the allegiance of England.

The next is 22 H. VI. fol. 38. Adrian's case; where it is pleaded that a woman was born at Bruges, out of the allegiance of England.

The third is 13 Eliz. Dyer, fol. 300. where the case begins thus: *Doctor Story qui notorie dignoscitur esse subditus regni Angliæ.* In all these three, say they, it is pleaded, that the party is subject of the *kingdom* of England, and not of the *king* of England.

To these books I give this answer, that they be not the pleas at large, but the words of the reporter, who speaks com-

pendiously and *narrativè*, and not according to the solemn words of the pleading. If you find a case put, that it is pleaded a man was seised *in fee-simple*, you will not infer upon that, that the words of the pleading were *in feodo simplici*, but *sibi et hæredibus suis*. But shew me some precedent of a pleading at large, of *natus sub ligeantia regni Angliæ*; for whereas Mr. Walter said that pleadings are variable in this point, he would fain bring it to that; but there is no such matter; for the pleadings are constant and uniform in this point: they may vary in the word *fides*, or *ligeantia*, or *obedientia*, and some other circumstances; but in the form of *regni* and *regis* they vary not: neither can there, as I am persuaded, be any one instance shewed forth to the contrary. See 9 E. 4 Baggot's Assize, fol. 7. where the pleading at large is entered in the book; there you have *alienigena natus extra ligeantiam domini regis Angliæ*. See the precedents in the book of entries[1], pl. 7. and two other places, for there be no more: and there you shall find still *sub ligeantia domini regis*, or *extra ligeantiam domini regis*. And therefore the forms of pleading, which are things so reverend, and are indeed towards the reasons of the law as *palma* and *pugnus*, containing the reasons of the law opened or unfolded, or displayed, they make all for us. And for the very words of reporters in books, you must acknowledge and say, *ilicet obruimur numero*. For you have 22 Ass. pl. 25. 27 Ass. the prior of Shells' case, pl. 48. 14 H. IV. fol. 19. 3 H. VI. fol. 55. 6 H. VIII. by my lord Dyer, fol. 2. In all these books the very words of the reporters have "the allegiance of the king," and not, the allegiance of England. And the book in the 42 E. III. which is your best book, although while it is tossed at the bar you have sometimes the words "allegiance of England," yet when it comes to Thorp, chief justice, to give the rule, he saith, "we will be certified by the roll, whether Scotland be within the allegiance of the king." Nay, that farther form of pleading beats down your opinion: that it sufficeth not to say that he is born out of the allegiance of the king, and stay there, but he must shew in the affirmative, under the allegiance of what king or state he was born. The reason whereof cannot be, because it may appear whether he be a friend or an enemy, for that in a real action is all one: nor it cannot be because issue shall be taken thereupon; for

[1] Blank left in MS.

the issue must arise on the other side upon *indigena* pleaded and traversed. And therefore it can have no other reason, but to apprize the court more certainly, that the country of the birth is none of those that are subject to the king. As for the trial, that it should be impossible to be tried, I hold it not worth the answering; for the *Venire facias* shall go either where the natural birth is laid, although it be but by fiction, or if it be laid according to the truth, it shall be tried where the action is brought. Otherwise you fall upon a main rock, that breaketh your argument in pieces: for how should the birth of an Irishman be tried, or of a Jerseyman? nay, how should the birth of a subject be tried, that is born of English parents in Spain or Florence, or any part of the world? For to all these the like objection of trial may be made, because they are within no counties: and this receives no answer. And therefore I will now pass on to the second main argument.

It is a rule of the civil law, say they, *Cum duo jura, etc.* when two rights do meet in one person, there is no confusion of them, but they remain still in the eye of law distinct, as if they were in several persons: and they bring examples of it of one man bishop of two sees, or one parson that is rector of two churches. They say this unity in the bishop or the rector doth not create any privity between the parishioners or dioceseners, more than if there were several bishops, or several parsons. This rule I allow, (as was said,) to be a rule not of the civil law only but of common reason, but [it][1] receiveth no forced or coined but a true and sound distinction or limitation, which is, that it evermore faileth and deceiveth in cases where there is any vigour or operation of the natural person; for generally in corporations the natural body is but *suffulcimentum corporis corporati*, it is but as a stock to uphold and bear out the corporate body; but otherwise it is in the case of the crown, as shall be manifestly proved in due place. But to shew that this rule receiveth this distinction, I will put but two cases; the statute of 21 H. VIII. ordaineth that a marquis may retain six chaplains qualified, a lord treasurer of England four, a privy councillor three. The lord treasurer Paulet was marquis of Winchester, lord treasurer of England, and privy councillor, all at once. The question was, whether he should qualify thirteen chaplains? Now by the rule *Cum duo jura* he should;

[1] Not in MS.

but adjudged, he should not. And the reason was, because the attendance of chaplains concerned and respected his natural person; he had but one soul, though he had three offices. The other case which I will put is the case of homage. A man doth homage to his lord for a tenancy held of the manor of Dale; there descendeth unto him afterwards a tenancy held of the manor of Sale, which manor of Sale is likewise in the hands of the same lord. Now by the rule *Cum duo jura*, he should do homage again; two tenancies and two seignories, though but one tenant and one lord; *æquum est ac si esset in duobus:* but ruled that he should not do homage again: nay in the case of the king he shall not pay a second respect of homage, as upon grave and deliberate consideration it was resolved, 42 Hen. VIII. and *usus scaccarii*, as there is said, accordingly. And the reason is no other but because when a man is sworn to his lord, he cannot be sworn over again: he hath but one conscience, and the obligation of this oath trencheth between the natural person of the tenant and the natural person of the lord. And certainly the case of homage and tenure, and of homage liege, which is our case, are things of a near nature, save that the one is much inferior to the other; but it is good to behold these great matters of state in cases of a lower element, as the eclipse of the sun is used to be in a pail of water.

The third main argument containeth certain supposed inconveniences, which may ensue of a general naturalization *ipso jure;* of which kind three have been chiefly remembered.

The first is the loss of profit to the king upon letters of denization and purchases of aliens.

The second is the concourse of Scotsmen into this kingdom, to the enfeebling of that realm of Scotland in people, and the impoverishing of this realm of England in wealth.

The third is, that the reason of this case stayeth not within the compass of the present case; for although it were some reason that Scotsmen were naturalized, being people of the same island and language, yet the reason which we urge, which is, that they are subjects to the same king, may be applied to persons every way more estranged from us than they are; as if in future time, in the king's descendants, there should be a match with Spain, and the dominions of Spain should be united with the crown of England, by our reason, (say they)

all the West Indies should be naturalized; which are people not only *aeterius soli*, but *alterius cœli*.

To these conceits of inconvenience how easy it is to give answer, and how weak they are in themselves, I think no man that doth attentively ponder them can doubt; for how small revenue can arise of such denizations, and how honourable were it for the king to take escheats of his subjects, as if they were foreigners, (for seizure of aliens' lands are in regard the king hath no hold or command of their persons and services) every one may perceive. And for the confluence of Scotsmen, I think, we all conceive the spring-tide is past at the King's first coming in; and yet we see very few families of them throughout the cities and boroughs of England. And for the naturalizing of the Indies, we can readily help that, when the case comes; for we can make an act of parliament of separation if we like not their consort. But these being reasons politic, and not legal, and we are not now in parliament, but before a judgment seat, I will not meddle with them, especially since I have one answer which avoids and confounds all their objections in law; which is, that the very self-same objections do hold in countries purchased by conquest. For in subjects obtained by conquest, it were more profit to indenizate by the poll; in subjects obtained by conquest, they may come in too fast; and if king Henry VII. had accepted the offer of Christopher Columbus, whereby the crown of England had obtained the Indies by conquest or occupation, all the Indies had been naturalized by the confession of the adverse part. And therefore since it is confessed, that subjects obtained by conquest are naturalised, and that all these objections are common and indifferent as well to case of conquest as case of descent, these objections are in themselves destroyed.

And therefore, to proceed now to overthrow that distinction of descent and conquest. Plato saith well, the strongest of all authorities is, if a man can allege the authority of his adversary against himself: we do urge the confession of the other side, that they confess the Irish are naturalized; that they confess the subjects of the Isles of Jersey and Guernsey, and Berwick, to be naturalized, and the subjects of Calais and Tournay, when they were English, were naturalized; as you may find in the 5 Eliz. in Dyer, upon the question put to the judges by Sir Nicholas Bacon, lord keeper.

To avoid this, they fly to a difference, which is new-coined, and is, (I speak not to the disadvantage of the persons that use it; for they are driven to it *tanquam ad ultimum refugium;* but the difference itself,) it is, I say, full of ignorance and error. And therefore, to take a view of the supports of this difference, they allege four reasons.

The first is, that countries of conquest are made parcel of England, because they are acquired by the arms and treasure of England. To this I answer, that it were a very strange argument, that if I wax rich upon the manor of Dale, and upon the revenue thereof purchase a close by it, that it should make that parcel of the manor of Dale. But I will set this new learning on ground with a question or case put. For I oppose them that hold this opinion with this question, If the king should conquer any foreign country by an army compounded of Englishmen and Scotsmen, (as it is like, whensoever wars are, so it will be,) I demand, Whether this country conquered shall be naturalized both in England and Scotland, because it was purchased by the joint arms of both? and if yea, whether any man will think it reasonable, that such subjects be naturalized in both kingdoms; the one kingdom not being naturalized toward the other?

These are the intricate consequences of conceits.

A second reason they allege is, that countries won by conquest become subject to the laws of England, which countries patrimonial are not, and that the law doth draw the allegiance, and allegiance naturalization.

But to the major proposition of that argument, touching the dependency of allegiance upon law, somewhat hath been already spoken, and full answer shall be given when we come to it. But in this place it shall suffice to say, that the minor proposition is false: that is, that the laws of England are not superinduced upon any country by conquest; but that the old laws remain until the king by his proclamation or letters patent declare other laws; and then if he will he may declare laws which be utterly repugnant, and differing from the laws of England. And hereof many ancient precedents and records may be shewed, that the reason why Ireland is subject to the laws of England is not *ipso jure* upon conquest, but grew by a charter of king John; and that extended but to so much as was then in the king's possession; for there are records in the

time of king E. I. and II. of divers particular grants to sundry subjects of Ireland and their heirs, that they might use and observe the laws of England.

The third reason is, that there is a politic necessity of intermixture of people in case of subjection by conquest, to remove alienations of mind, and to secure the state; which holdeth not in case of descent. Here I perceive Mr. Walter hath read somewhat in matter of state; and so have I likewise; though we may both quickly lose ourselves in a cause of this nature.

I find by the best opinions, that there be two means to assure and retain in obedience countries conquered, both very differing, almost in extremes, the one towards the other.

The one is by colonies, and intermixture of people, and transplantation of families, which Mr. Walter spoke of; and it was indeed the Roman manner: but this is like an old relic, much reverenced and almost never used. But the other, which is the modern manner, and almost wholly in practice and use, is by garrisons and citadels, and lists or companies of men of war, and other like matters of terror and bridle.

To the first of these, which is little used, it is true that naturalization doth conduce, but to the latter it is utterly opposite, as putting too great pride and means to do hurt in those that are meant to be kept short and low. And yet in the very first case, of the Roman proceeding, naturalization did never follow by conquest, during all the growth of the Roman empire; but was ever conferred by charters, or donations, sometimes to cities and towns, sometimes to particular persons, and sometimes to nations, until the time of Adrian the emperor, and the law *In orbe Romano:* and that law or constitution is not referred to title of conquest and arms only, but to all other titles; as by the donation and testament of kings, by submission and dedition of states, or the like: so as this difference was as strange to them as to us. And certainly I suppose it will sound strangely, in the hearing of foreign nations, that the law of England should *ipso facto* naturalize subjects of conquests, and should not naturalize subjects which grow unto the king by descent; that is, that it should confer the benefit and privilege of naturalization upon such as cannot at the first but bear hatred and rancour to the state of England, and have had their hand in the blood of the subjects of England, and should deny the like benefit to those that are conjoined with them by a

more amiable mean; and that the law of England should confer naturalization upon slaves and vassals, for people conquered are no better in the beginning, and should deny it to freemen: I say, it will be marvelled at abroad, of what complexion the laws of England be made, that breedeth such differences. But there is little danger of such scandals; for this is a difference that the law of England never knew.

The fourth reason of this difference is, that in case of conquest the territory united can never be separated again; but in case of descent there is a possibility; if his Majesty's line should fail, the kingdoms may sever again to their respective heirs; as in the case of 8 Hen. VI. where it is said, that if land descend to a man from the ancestor on the part of his father, and a rent issuing out of it from an ancestor on the part of the mother; if the party die without issue, the rent is revived. As to this reason, I know well the continuance of the king's line is no less dear to those that allege the reason, than to us that confute it. So as I do not blame the pressing of the reason: but it is answered with no great difficulty; for, first, the law doth never respect remote and foreign possibilities, as notably appeared in the great case between Sir Hugh Cholmley and Houlford in the exchequer, where one in the remainder, to the end to bridle tenant in tail from suffering a common recovery, granted his remainder to the king; and because he would be sure to have it out again without charge or trouble when his turn were served, he limited it to the king during the life of tenant in tail. Question grew, whether this grant of remainder were good, yea or no. And it was said to be frivolous and void, because it could never by any possibility execute; for tenant in tail cannot surrender; and if he died, the remainder likewise ceased. To which it was answered, that there was a possibility that it might execute, which was thus: Put case, that tenant in tail should enter into religion, having no issue; then the remainder should execute, and the king should hold the land during the natural life of tenant in tail, notwithstanding his civil death. But the court *una voce* exploded this reason, and said, that monasteries were down, and entries into religion gone, and they must be up again ere this could be; and that the law did not respect such remote and foreign possibilities. And so we may hold this for the like. For I think we all hope, that neither of those days shall ever

come, either for monasteries to be restored, or for the king's line to fail. But the true answer is, that the possibility subsequent, remote or not remote, doth not alter the operation of law for the present. For that should be as if, in case of the rent which you put, you should say, that in regard that the rent may be severed, it should be said to be *in esse* in the mean time, and should be grantable; which is clearly otherwise. And so in the principal case, if that should be, which God of his goodness forbid, *cessante causa cessat effectus*, the benefit of naturalization for the time to come is dissolved. But that altereth not the operation of the law, *rebus sic stantibus*. And therefore I conclude that this difference is but a device full of weakness and ignorance; and that there is one and the same reason of naturalizing subjects by descent, and subjects by conquest; and that is the union in the person of the king; and therefore that the case of Scotland is as clear as that of Ireland, and they that grant the one cannot deny the other. And so I conclude this second part, touching confutation.

To proceed therefore to the proofs of our part, your lordships cannot but know many of them must be already spent in the answer which we have made to the objections. For *corruptio unius generatio alterius* holds as well in arguments, as in nature; the destruction of an objection begets a proof. But nevertheless I will avoid all iteration, lest I should seem either to distrust your memories, or to abuse your patience; but will hold myself only to those proofs which stand substantially of themselves, and are not intermixed with matter of confutation. I will therefore prove unto your lordships that the *post-natus* of Scotland is by the law of England natural, and ought so to be adjudged, by three courses of proof.

1. First, upon point of favour of law.
2. Secondly, upon reasons and authorities of law.
3. And lastly, upon former precedents and examples.

1. Favour of law: what mean I by that? The law is equal and favoureth not. It is true, not persons; but things or matters it doth favour. Is it not a common principle, that the law favoureth three things, life, liberty, and dower? And what is the reason of this favour? This, because our law is grounded upon the law of nature, and these three things do flow from the law of nature; preservation of life, natural; liberty, which every beast or bird seeketh and affecteth,

natural; the society of man and wife, whereof dower is the reward, natural. It is well. Doth the law favour liberty so highly, as a man shall enfranchise his bondman, when he thinketh not of it, by granting to him lands or goods? and is the reason of it *quia natura omnes homines erant liberi;* and that servitude or villenage doth cross and abridge the law of nature? and doth not the self-same reason hold in the present case? For, my lords, by the law of nature all men in the world are naturalized one towards another; they were all made of one lump of earth, of one breath of God; they had the same common parents; nay, at the first they were, as the Scriptnre sheweth, *unius labii*, of one language, until the curse; which curse, thanks be to God, our present case is exempted from. It was civil and national laws that brought in these words, and differences, of *civis* and *exterus*, alien and native. And therefore because they tend to abridge the law of nature, the law favoureth not them, but takes them strictly: even as our law hath an excellent rule, that customs of towns and boroughs shall be taken and construed strictly and precisely, because they do abridge and derogate from the law of the land. So by the same reason, all national laws whatsoever are to be taken strictly and hardly in any point wherein they abridge and derogate from the law of nature. Whereupon I conclude that your lordships cannot judge the law for the other side, except the case be *luce clarius;* and if it appear to you but doubtful, as I think no man in his right senses but will yield it to be at least doubtful, then ought your lordships, under your correction be it spoken, to pronounce for us because of the favour of law. Furthermore as the law of England must favour naturalization as a branch of the law of nature, so it appears manifestly, that it doth favour it accordingly. For it is[1] not much to make a subject naturalized by the law of England: it should suffice, either place or parents. If he be born in England it is no matter though his parents be Spaniards, or what you will: on the other side, if he be born of English parents, it skilleth not though he be born in Spain, or in any other place of the world. In such sort doth the law of England open her lap to receive in people to be naturalized; which indeed sheweth the wisdom and excellent composition of our law, and that it is the law of

[1] I have ventured on transposing the words, which in the MS. stand "is it," with a note of interrogation at "parents," and substituting colons for full stops in several clauses following.

a warlike and a magnanimous nation fit for empire. For look, and you shall find that such kind of estates have been ever liberal in point of naturalization: whereas merchant-like and envious estates have been otherwise.

2. For the reasons of law joined with authorities, I do first observe to your lordships, that our assertion or affirmation is simple and plain: that it sufficeth to naturalization, that there be one king, and that the party be *natus ad fidem regis*, agreeable to the definition of Littleton, which is: *Alien is he which is born out of the allegiance of our lord the king.* They of the other side speak of respects, and *quoad*, and *quatenus*, and such subtilties and distinctions. To maintain therefore our assertion, I will use three kinds of proofs.

The first is, that allegiance cannot be applied to the law or kingdom, but to the person of the king, because the allegiance of the subject is more large and spacious, and hath a greater latitude and comprehension than the law or the kingdom. And therefore it cannot be a dependency of that without the which it may of itself subsist.

The second proof which I will use is, that the natural body of the king hath an operation and influence into his body politic, as well as his body politic hath upon his body natural; and therefore, that although his body politic of king of England, and his body politic of king of Scotland, be several and distinct, yet nevertheless his natural person, which is one, hath an operation upon both, and createth a privity between them.

And the third proof is the binding text of five several statutes.

For the first of these, I shall make it manifest, that allegiance is of a greater extent and dimension than laws or kingdom, and cannot consist by the laws merely; because it began before laws, it continueth after laws, and it is in vigour where laws are suspended and have not their force.[1] That it is more

[1] Mr. Hallam, after observing that "the high flying creed of prerogative mingled itself intimately with this question of naturalisation, which was much argued on the monarchical principle of personal allegiance to the sovereign, as opposed to the half republican theory that lurked in the contrary proposition," goes on to cite in illustration this thesis of Bacon's, alongside of the 5th of Coke's, "demonstrative illations or conclusions," at the close of his Report, fol. 49.; viz. that "whatsoever is due by the law and constitution of man may be altered; but natural legiance or obedience of the subject cannot be altered; *ergo*, natural legiance or obedience to the sovereign is not due by the law or constitution of man." The measure of propriety is not the same for the advocate and for the judge; and there is one part of the proof which Bacon offers of the last part of his proposition,—I mean the king's supreme authority by martial law in time of war,—which would, I suppose, have been open to serious comment if judicially delivered. But surely a glance at the context is enough to show that Bacon means something very different from what seems the obvious sense of

ancient than law, appeareth by that which was spoken in the beginning by way of inducement; where I did endeavour to demonstrate, that the original age of kingdoms was governed by natural equity, that kings were more ancient than lawgivers, that the first submissions were simple, and upon confidence to the person of kings and that the allegiance of subjects to hereditary monarchs can no more be said to consist by laws, than the obedience of children to parents.

That allegiance continueth after laws, I will only put the case, which was remembered by two great judges in a great assembly, the one of them now with God: which was; that if a king of England should be expulsed his kingdom, and some particular subjects should follow him in flight or exile in foreign parts, and any of them there should conspire his death; upon his recovery of his kingdom, such a subject might by the law of England be proceeded with for treason committed and perpetrated at what time he had no kingdom, and in place where the law did not bind.

That allegiance is in vigour and force where the power of law hath a cessation, appeareth notably in time of wars. For *silent leges inter arma.* And yet the sovereignty and imperial power of the king is so far from being then extinguished or suspended, as contrariwise it is raised and made more absolute; for then he may proceed by his supreme authority, and martial law, without observing formalities of the laws of his kingdom. And therefore whosoever speaks of laws, and the king's power by laws, and the subject's obedience or allegiance to laws, speak but of one half of the crown. For Bracton, out of Justinian, doth truly define the crown to consist of laws and arms, power civil and martial. With the latter whereof the law doth not intermeddle: so as where it is much spoken,

Coke's syllogism. That monarchy, and especially hereditary monarchy, took its rise, in general, in natural relations or peculiar exigencies antecedent to formal constitutions, and that therefore the relation of king and subject was before (though subject to be defined and regulated by) the fundamental laws of kingdoms is at least a plausible historical theory; that allegiance, according to English law, "continueth after laws" and "is in vigour where the power of law hath acceptation" he endeavours to prove below; but all this is for the purpose of making out that a natural subject of the king need not be a subject of the English laws, and has nothing to do with the question whether allegiance can or cannot be "altered by the law of man," or is or is not "due by the law of man" only. Bacon does elsewhere assert the very dangerous doctrine of an "inseparable prerogative," a doctrine which could be altogether got rid of only by setting aside as unconstitutional several ruled cases which seem to have passed unquestioned among the lawyers of that day (see *supra*, p. 370.; 7 Co. 27.; Plowd. 502.); but I am not aware that, in his authentic works, he anywhere maintains what may be called the transcendental theory of prerogative, which I suppose Mr. Hallam to have had in view.

that the subjects of England are under one law, and the subjects of Scotland are under another law, it is true at Edinburgh or Stirling, or again in London or York; but if Englishmen and Scotsmen meet in an army royal before Calais, I hope then they are under one law. So likewise not only in time of war, but in time of peregrination: If a king of England travel or pass through foreign territories, yet the allegiance of his subjects followeth him: as appears in that notable case which is reported in Fleta, where one of the train of king Edward I. as he passed through France from the holy land, imbezzled some silver plate at Paris, and jurisdiction was demanded of this crime by the French king's counsel at law, *ratione soli*, and demanded likewise by the officers of king Edward, *ratione personæ;* and after much solemnity, contestation, and interpleading, it was ruled and determined for king Edward, and the party tried and judged before the knight marshal of the king's house, and hanged after the English law, and execution in St. Germain's meadows. And so much for my first proof.

For my second main proof, it is drawn from the true and legal distinction of the king's several capacities; for they that maintain the contrary opinion do in effect destroy the whole force of the king's natural capacity, as if it were drowned and swallowed up by his politic. And therefore I will first prove to your lordships, that his two capacities are in no sort confounded. And secondly, that as his capacity politic worketh so upon his natural person, as it makes it differ from all other the natural persons of his subjects; so *e converso*, his natural body worketh so upon his politic, as the corporation of the crown utterly differeth from all other corporations within the realm.

For the first, I will vouch you the very words which I find in that notable case of the duchy, where the question was, whether the grants of king Edward VI. for duchy lands should be avoided in point of nonage? The case, as your lordships know well, is reported by Mr. Plowden as the general resolution of all the judges of England, and the king's learned counsel, Rouswell the solicitor only excepted; there I find these words, Comment. fol. 285. "There is in the king not a body natural alone, nor a body politic alone, but a body natural and politic together: *corpus corporatum in corpore naturali, et corpus naturale in corpore corporato.*" The like I find in the great case

of the lord Barckley set down by the same reporter. Comment. fol. 234. "Though there be in the king two bodies, and that those two bodies are conjoined, yet are they by no means confounded the one by the other."

Now then to see the mutual and reciprocal intercourse, as I may term it, or influence or communication of qualities, that these bodies have the one upon the other: the body politic of the crown indueth the natural person of the king with these perfections: That the king in law shall never be said to be within age: that his blood shall never be corrupted: and that if he were attainted before, the very assumption of the crown purgeth it: that the king shall not take but by matter of record, although he take in his natural capacity, as upon a gift in tail: that his body in law shall be said to be as it were immortal; for there is no death of the king in law, but a demise, as it is termed: with many other the like privileges and differences from other natural persons too long to rehearse, the rather because the question laboureth not in that part. But on the contrary part let us see what operations the king's natural person hath upon his crown and body politic: of which the chiefest and greatest is, that it causeth the crown to go by descent; which is a thing strange and contrary to the course of all corporations, which evermore take in succession and not by descent. For no man can shew me in all the corporations of England, of what nature soever, whether they consist of one person, or of many, or whether they be temporal or ecclesiastical, — not any one takes to him or his heirs, but all to him and his successors. And therefore here you may see what a weak course that is, to put cases of bishops and parsons, and the like, and to apply them to the crown. For the king takes to him and his heirs in the manner of a natural body, and the word *successors* is but superfluous: and where it is used, it is ever duly placed after the word *heirs*, "the king, his heirs, and successors."

Again, no man can deny but *uxor et filius sunt nomina naturæ*. A corporation can have no wife, nor a corporation can have no son: how is it then that it is treason to compass the death of the queen or of the prince? There is no part of the body politic of the crown in either of them, but it is entirely in the king. So likewise we find in the case of the lord Berkley, the question was, whether the statute of 35 Henry VIII.

for that part which concerned queen Catherine Parr's jointure, were a public act or no, of which the judges ought to take notice, not being pleaded; and judged a public act.

So the like question came before your lordship, my lord Chancellor, in serjeant Heale's case: whether the statute of 11 Edward III., concerning the entailing of the dukedom of Cornwall to the prince, were a public act or no; and ruled likewise a public act. Why no man can affirm but these be operations of law, proceeding from the dignity of the natural person of the king; for you shall never find that any other corporation whatsoever of a bishop, or master of a college, or mayor of London, worketh any thing in law upon the wife or son of the bishop or the mayor. And to conclude this point, and withal to come near to the case in question, I will shew you where the natural person of the king hath not only an operation in the case of his wife and children, but likewise in the case of his subjects, which is the very question in hand. As for example, I put this case: Can a Scotsman, who is a subject,—subject to the natural person of the king, and not to the crown of England—can a Scotsman, I say, be an enemy by the law to the subjects of England? Or must he not of necessity, if he should invade England, be a rebel and no enemy, not only as to the king, but as to the subject? Or can any letters of mart or reprisal be granted against a Scotsman that shall spoil an Englishman's goods at sea? And certainly this case doth press exceedingly near the principal case; for it proveth plainly, that the natural person of the king hath surely a communication of qualities with his body politic, as it makes the subjects of either kingdom stand in another degree of privity one towards the other, than they did before. And so much for the second proof.

For the five acts of parliament which I spoke of, which are concluding to this question: The first of them is that concerning the banishment of Hugh Spencer in the time of king Edward II. in which act there is contained the charge and accusation whereupon his exile proceeded, one article of which charge is set down in these words: "Homage and oath of the subject is more by reason of the crown than by reason of the person of the king: So that if the king doth not guide himself by reason in right of the crown, his lieges are bound by their oath to the crown to remove the king." By which act

doth plainly appear the perilous consequence of this distinction concerning the person of the king and the crown. And yet I do acknowledge justly and ingenuously a great difference between that assertion and this, which is now maintained: for it is one thing to make things distinct, another thing to make them separable, *aliud est distinctio aliud separatio;* and therefore I assure myself, that those that now use and urge that distinction, do as firmly hold, that the subjection to the king's person and the crown are inseparable, though distinct, as I do. And it is true that the poison of the opinion and assertion of Spencer is like the poison of a scorpion, more in the tail than in the body: for it is the inference that they make, which is, that the king may be deposed or removed, that is the treason and disloyalty of that opinion. But by your leave, the body is never a whit the more wholesome meat for having such a tail belonging to it; therefore we see it is *locus lubricus*, an opinion from which a man may easily slide into an absurdity. But upon this act of parliament I will only note one circumstance more, and so leave it, which may add authority unto it in the opinion of the wisest; and that is, that these Spencers were not ancient nobles or great patriots that were charged and prosecuted by upstarts and favourites: for then it might be said, that it was but the action of some flatterers, who use to extol the power of monarchs to be infinite: but it was contrary; a prosecution of those persons being favourites by the nobility; so as the nobility themselves, which seldom do subscribe to the opinion of an infinite power of monarchs, yet even they could not endure, but their blood did rise to hear that opinion, that subjection is owing to the crown rather than to the person of the king.

The second act of parliament which determined this case, is the act of recognition in the first year of his Majesty, wherein you shall find that, in two several places, the one in the preamble, the other in the body of the act, the parliament doth recognise that these two realms of England and Scotland are under one imperial crown. The parliament doth not say under one monarchy or king, which might refer to the person, but under one imperial crown, which cannot be applied but to the sovereign power of regiment comprehending both kingdoms. And the third act of parliament is the act made in the fourth year of his Majesty's reign, for the abolition of hostile laws;

wherein your lordships shall find likewise in two places, that the parliament doth acknowledge, that there is an union of these two kingdoms already begun in his Majesty's person: so as, by the declaration of that act, they have not only one king, but there is an union in inception in the kingdoms themselves.

These two are judgments in parliament by way of declaration of law, against which no man can speak. And certainly these are righteous and true judgments to be relied upon; not only for the authority of them, but for the verity of them. For to any that shall well and deeply weigh the effects of law upon this conjunction, it cannot but appear, that although *partes integrales* of the kingdom, as the philosophers speak, such as the laws, the officers, the parliaments, are not yet commixed; yet nevertheless there is but one and the self-same fountain of sovereign power, depending upon the ancient submission whereof I spake in the beginning; and in that sense the crowns and the kingdoms are truly said to be united.

And the force of this truth is such, that a grave and learned gentleman, that defended the contrary opinion, did confess thus far: That in ancient times, when monarchies, as he said, were but heaps of people without any exact form of policy; that then naturalization and communication of privileges did follow the person of the monarch; but otherwise since states were reduced to a more exact form. So as thus far we did consent; but still I differ from him in this, that these more exact forms, wrought by time, and custom, and laws, are nevertheless still upon the first foundation, and do serve only to perfect and corroborate the force and bond of the first submission, and in no sort to disannul or destroy it.

And therefore with these two acts do I likewise couple the act of 14 Edward III. which hath been alleged of the other side. For by collating of that act with these former two, the truth of that we affirm will the more evidently appear, according unto the rule of reason: *opposita juxta se posita magis elucescunt.* That act of 14 is an act of separation; these two acts formerly recited are acts tending to union. That[1] act is an act that maketh a new law; for it is by words of "grant and establish": these two acts declare the common law as it is, being by words of recognition and confession.

And therefore upon the difference of these laws you may

[1] This in MS.

substantially ground this position: That the common law of England, upon the adjunction of any kingdom unto the king of England, doth make some degree of union in the crowns and kingdoms themselves; except by a special act of parliament they be dissevered.

Lastly, the fifth act of parliament which I promised, is the act made in 42 E. III. cap. 10. which is an express decision of the point in question. The words are, "Item, (upon the "petition put into parliament by the commons that infants "born beyond the seas in the seigniories of Calais, and elsewhere within the lands and seigniories that pertain to our "sovereign lord the king beyond the seas, be as able and inheritable of their heritage in England, as other infants born "within the realm of England,) it is accorded that the common "law and the statute formerly made be holden."

Upon this act I infer thus much. First, that such as the petition mentioneth were naturalized, the practice shews: then if so, it must be either by common law or statute, for so the words purport: not by statute, for there is no other statute but 25 E. III. and that extends to the case of birth out of the king's obedience, where the parents are English; *ergo* it was by the common law, for that only remains. And so, by the declaration of this statute, at the common law "all infants, born "within the lands and seigniories (for I give you the very "words again) that pertain to our sovereign lord the king, (it "is not said, as are the dominions of England) are as able and "inheritable of their heritage in England, as other infants born "within the realm of England." What can be more plain? And so I leave statutes and go to precedents; for though the one do bind more, yet the other sometimes doth satisfy more.

For precedents; in the producing and using of that kind of proof, of all others, it behoveth them to be faithfully vouched; for the suppressing or keeping back of a circumstance may change the case: and therefore I am determined to urge only such precedents, as are without all colour or scruple of exception or objection, even of those objections which I have, to my thinking, fully answered and confuted.

This is now, by the providence of God, the fourth time that the line and kings of England have had dominions and seigniories united unto them as patrimonies, and by descent of blood; four unions, I say, there have been *inclusivè* with this last. The

first was of Normandy, in the person of William, commonly called the Conqueror. The second was of Gascoigne, and Guienne, and Anjou, in the person of king Henry II.; in his person, I say, though by several titles. The third was of the crown of France, in the person of king Edward III. And the fourth of the kingdom of Scotland, in his Majesty. Of these I will set aside such as by any cavillation can be excepted unto.

First, I will set aside Normandy, because it will be said, that the difference, of country accruing by conquest from countries annexed by descent, in matter of communication of privileges, holdeth both ways, as well of the part of the conquering kingdom, as the conquered; and therefore that although Normandy was no conquest of England, yet England was a conquest of Normandy; and so a communication of privileges between them. Again, set aside France, for that it will be said that although the king had a title in blood and by descent, yet that title was executed and recovered by arms; so as it is a mixt title of conquest and descent, and therefore the precedent not so clear.

There remains then Gascoigne and Anjou, and that precedent likewise I will reduce and abridge to a time, to avoid all question. For it will be said of them also, that, after, they were lost, and recovered *in ore gladii*[1]; that the ancient title of blood was extinct; and that the king was in upon his new title by conquest: and Mr. Walter hath found a book-case in 13 H. VI. abridged by Mr. Fitz-Herbert, in title of *Protection placito 56.*, where a protection was cast, *quia profecturus in Gasgoniam* with the earl of Huntingdon, and challenged because it was not a voyage *royal;* and the justices thereupon required the sight of the commission, which was brought before them, and purported power to pardon felonies and treason, power to coin money, and power to conquer them that resist: whereby Mr. Walter, finding the word *conquest*, collected that the king's title at that time was reputed to be by *conquest.* Wherein I may not omit to give *obiter* that answer which law and truth provide, namely, that when any king obtaineth by war a country whereunto he hath right by birth, that he is ever in upon his ancient right, and not upon his purchase by conquest; and the reason is, that there is as well a judgment and recovery by war and arms, as by law and course of justice.

[1] So in MS.: but I suppose it should be *jure gladii.*

For war is a tribunal-seat, wherein God giveth the judgment, and the trial is by battle, or duel, as in the case of trial of private right: and then it follows, that whosoever cometh in by eviction, comes in his *remitter;* so as there will be no difference in countries whereof the right cometh by descent, whether the possession be obtained peaceably or by war. But yet nevertheless, because I will utterly take away all manner of evasion and subterfuge, I will yet set apart that part of time, in and during the which the subjects of Gascoigne and Guienne might be thought to be subdued by a re-conquest. And therefore I will not meddle with the prior of Shells' case, though it be an excellent case, because it was in time 27 E. III.; neither will I meddle with any cases, records, or precedents, in the time of king H. V. or king H. VI. for the same reason; but will hold myself to a portion of time from the first uniting of these provinces in the time of king H. II. until the time of king John, at what time those provinces were lost; and from that time again unto the seventeenth year of the reign of king E. II. at what time the statute of *prærogativa Regis* was made, which altered the law in the point in hand.

That in both these times the subjects of Gascoigne, and Guienne, and Anjou, were naturalized for inheritance in England, by the laws of England, I shall manifestly prove; and the proof proceeds, as to the former time, (which is our case,) in a very high degree *a minore ad majus*, and as we say, *a multo fortiori*. For if this privilege of naturalization remained unto them when the countries were lost, and became subjects in possession to another king, much more did they enjoy it as long as they continued under the king's subjection.

Therefore to open the state of this point. After these provinces were, through the perturbations of the state in the unfortunate time of king John, lost and severed, the principal persons which did adhere unto the French were attainted of treason, and their escheats here in England taken and seized. But the people, that could not resist the tempest when their heads and leaders were revolted, continued inheritable to their possessions in England; and reciprocally the people of England inherited and succeeded to their possessions in Gascoigne, and were both accounted *ad fidem utriusque regis*, until the statute of *prærogativa Regis*. Wherein the wisdom and justice of the law of England is highly to be commended. For of

this law there are two grounds of reason, the one of equity, the other of policy. That of equity was, because the common people were in no fault, but as the Scripture saith in a like case, *quid fecerunt oves istæ?* It was the cowardice and disloyalty of their governors that deserved punishment, but *what have these sheep done?* And therefore to have punished them, and deprived them of their lands and fortunes, had been unjust. That of policy was, because if the law had forthwith, upon the loss of the countries by an accident of time, pronounced the people for aliens, it had been a kind of cession of their right and a disclaimer in them, and so a greater difficulty to recover them. And therefore we see the statute which altered the law in this point was made in the time of a weak king, that, as it seemed, despaired ever to recover his right; and therefore thought better to have a little present profit by escheats, than the continuance of his claim, and the countenance of his right, by the admitting of them to enjoy their inheritances as they did before.

The state therefore of this point being thus opened, it resteth to prove our assertion, that they were naturalized: for the clearing whereof I shall need but to read the authorities, they be so direct and pregnant.

The first is the very text of the statute of *prærogativa Regis. Rex habebit escætas de terris Normannorum cujuscunque feodi fuerint, salvo servitio, quod pertinet ad capitales dominos feodi illius: et hoc similiter intelligendum est, si aliqua hæreditas descendat alicui nato in partibus transmarinis, et cujus antecessores fuerunt ad fidem regis Franciæ, ut tempore regis Johannis, et non ad fidem regis Angliæ, sicut contingit de baronia Monumetæ*, &c.

By which statute it appears plainly, that before the time of King John there was no colour of any escheat, because they were the king's subjects in possession, as Scotland now is; but only it determines the law from that time forward.

This statute if it had in it any obscurity, it is taken away by two lights, the one placed before it, and the other placed after it; both authors of great credit, the one for ancient, the other for late times: the former is Bracton, in his cap. *De exceptionibus* 24, *lib.* 5. *fol.* 427. and his words are these: *Est etiam et alia exceptio quæ tenenti competit ex persona petentis, propter defectum nationis, quæ dilatoria est, et non perimit actionem; ut*

si quis alienigena qui fuerit ad fidem regis Franciæ, et actionem instituat versus aliquem, qui fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes.

By these words it appeareth, that after the loss of the provinces beyond the seas, the naturalization of the subjects of those provinces was in no sort extinguished, but only was in suspense during the time of war and no longer; for he saith plainly that the exception, (which we call plea to the person) of *alien*, was not peremptory, but only dilatory; that is to say, during the time of war, and until there were peace concluded, which he terms by these words, *donec terræ fuerint communes:* which, though the phrase seem somewhat obscure, is expounded by Bracton himself in his fourth book, fol. 297.[1] to be of peace made and concluded. Whereby the inhabitants of England and those provinces mought enjoy the profits and fruits of their lands in either place *communiter*, that is, respectively, or as well the one as the other: so as it is clear they were no aliens in right, but only interrupted and debarred of suits in the king's courts in time of war.

The authority after the statute is that of Mr. Stamford, the best expositor of a statute that hath been in our law, a man of reverend judgment and excellent order in his writings. His words are in his exposition upon the branch of the statute which we read before: "By this branch it should appear, that at this time men of Normandy, Gascoigne, Guienne, Anjou, and Britain, were inheritable within this realm, as well as Englishmen, because that they were sometimes subjects to the kings of England, and under their dominion, until king John's time, as is aforesaid: and yet after his time, those men, saving such whose lands were taken away for treason, were still inheritable within this realm ti'l the making of this statute; and in the time of peace between the two kings of England and France they were answerable within this realm, if they had brought any action for their lands and tenements."

So as by these three authorities, every one so plainly pursuing the other, we conclude that the subjects of Gascoigne, Guienne, Anjou, and the rest, from their first union by descent until the making of the statute of *prærogativa Regis*, were inheritable in England, and to be answered in the king's courts in

[1] Apparently a wrong reference in the MS. In fol. 298. the phrase occurs, but without further explanation.

all actions, except it were in time of war. Nay more, which is *de abundante*, that when the provinces were lost and disannexed, and that the king was but king *de jure* over them, and not *de facto;* yet nevertheless the privilege of naturalization continued.

There resteth yet one objection, rather plausible to a popular understanding than any ways forcible in law or learning: which is a difference taken between the kingdom of Scotland and these duchies, for that the one is a kingdom, and the other was not so; and therefore that those provinces being of an inferior nature did acknowledge our laws and seals and Parliament, which the kingdom of Scotland doth not.

This difference was well given over by Mr. Walter; for it is plain that a kingdom and absolute dukedom, or any other sovereign estate, do differ *honore*, and not *potestate:* for divers duchies and counties that are now, were sometimes kingdoms, and divers kingdoms that are now, were sometimes duchies, or of other inferior style: wherein we need not travel abroad, since we have in our own state so notorious an instance of the country of Ireland, whereof king H. VIII. of late time was the first that writ himself king, the former style being lord of Ireland, and no more; and yet kings had the same authority before, that they have had since, and the nation the same marks of a sovereign state, as their Parliaments, their arms, their coins, as they now have: so as this is too superficial an allegation to labour upon.

And if any do conceive that Gascoigne and Guienne were governed by the laws of England: first that cannot be in reason. For it is a true ground, that wheresoever any prince's title unto any country is by law, he can never change the laws, for that they create his title; and therefore, no doubt those duchies retained their own laws; which if they did, then they could not be subject to the laws of England. And next, again, the fact or practice was otherwise, as appeareth by all consent of story and record; for those duchies continued governed by the civil law, their trials by witnesses and not by jury, their lands testamentary, and the like.

Now for the colours that some have endeavoured to give, that they should have been subordinate to the government of England; they are partly weak, and partly such as make strongly against them. For as to that, that writs of *Habeas*

Corpus under the great seal of England have gone to Gascoigne, it is no manner of proof; for that the king's writs, which are mandatory and not writs of ordinary justice, may go to his subjects into any foreign parts whatsoever, and under what seal it pleaseth him to use. And as to that, that some acts of Parliament have been cited, wherein the Parliament of England have taken upon them to order matters of Gascoigne; if those statutes be well looked into, nothing doth more plainly convince the contrary; for they intermeddle with nothing but that that concerneth either the English subject personally, or the territories of England locally, and never the subjects of Gascoigne or the territories of Gascoigne. For look upon the statute of 27 E. III. cap. 5. there it is said, that there shall be no forestalling of wines. But by whom? Only by English merchants; not a word of the subjects of Gascoigne, and yet no doubt they might be offenders in the same kind. So in the sixth chapter it is said, that all merchants Gascoignes may safely bring wines into what part it shall please them; here now are the persons of Gascoignes; but then the place whither? Into the realm of England. And in the seventh chapter, that erects the ports of Bordeaux and Bayonne for the staple towns of wine; the statute ordains, "that if any," but who? "English merchant, or his servants, shall buy or bargain other where, his body shall be arrested by the steward of Gascoigne, or the constable of Bordeaux:" true, for the officers of England could not catch him in Gascoigne; but what shall become of him, shall he be proceeded with within Gascoigne? No, but he shall be sent over into England to the Tower of London.

And this doth notably disclose the reason of that custom which some have sought to wrest the other way: that custom, I say, whereof a form doth yet remain, that in every Parliament the king doth appoint certain committees in the upper house to receive the petitions of Normandy, Guienne, and the rest; which, as by the former statute doth appear, could not be for the ordering of the governments there, but for the liberties and good usage of the subjects of those parts when they came hither, or *vice versa*, for the restraining of the abuses and misdemeanors of our subjects when they went thither.

Wherefore I am now at an end. For as to speak of the mischiefs, I hold it not fit for this place; lest we should seem to bend the laws to policy, and not to take them in their true and

natural sense. It is enough that every man knows, that it is true of these two kingdoms, which a good father said of the churches of Christ: *si inseparabiles insuperabiles.* Some things I may have forgot; and some things, perhaps, I may forget willingly; for I will not press any opinion or declaration of late time which may prejudice the liberty of this debate; but *ex dictis, et ex non dictis,* upon the whole matter, I pray judgment for the plaintiff.

THE

ARGUMENT ON THE WRIT

DE

NON PRECEDENDO REGE INCONSULTO.

PREFACE.

I HAVE already explained why this argument is reprinted from the *Collectanea Juridica*, and not from the Stowe MS. I have only made obvious verbal and typographical corrections, and have generally noted the former.

The case is reported by Moore, p. 842.; by Bulstrode, vol. iii. p. 32.; and by Rolle, vol. i. pp. 188. 206. and 288. It commenced in Easter Term, 1615. This last speech of Bacon's was delivered January 25th, 1615-6: the former editor, though giving references to all the reports, seems not to have looked at Rolle, who at p. 288. gives a full summary of it, and has been misled by Bulstrode into imagining that it was prepared, but never spoken. Bacon himself, on the contrary, says it had "a mixture of the sudden." He adds, that it took two hours and a half in the delivery, and "lost not one auditor that was present at the beginning," and that Coke pronounced it to be "a famous argument." [1]

The case was this: —

In or before September, 1611 [2], John Murray, Groom of the Bedchamber, procured the appointment of the defendant Michell [3] to a newly created Patent Office, "for the sole making of writs of *Supersedeas quia improvidè emanavit*, in the Common Pleas." The plaintiff Brownlow, who had held the office of Prothonotary from the time of Elizabeth [4], brought an assize to be restored to the possession of the ancient fees attached to this

[1] See his letter to the King, January 27th, 1615-6.

[2] It is difficult and not material to make out the exact facts and dates. It is said that two Patents were recited in the Writ *de non procedendo*; the date of the first being January 9th, 7 Jac. i. e. 1609-10. Sept. 19th, 1611, is the date of a Docket in the State Paper Office, directing Sir William Killigrew or his deputy, "to be acquainted with the Patent made to John Michell, at the suit of John Murray, &c." One Cox or Cop was a co-defendant, and I suppose the two Patents may somehow have reference to the two names.

[3] Sir John in the Reports, Esquire in the S. P. O.

[4] Burke's Extinct Baronetages, the only authority which I could light upon after some search.

duty, and so raised the question whether the patent was lawful. The cause of the delay till 1613 is not explained.

Bacon disclaims having had any hand in passing this patent.[1] Murray was influential at Court; his name occurs not unfrequently in the S. P. O. Calendar, as the recipient of grants of various kinds in his own name; and Bacon speaks of him as directly interested in this case. It seems probable, therefore, that the grant was made merely *improvidè*, as matter of favour, and without any deliberate design either of altering the constitution of the offices of the Common Law Courts, or of providing for the necessities of the Crown, after the French fashion, by the creation and sale of new offices.

But it appears that in this, as in the contemporary business of monopolies, James was running into difficulties before which Elizabeth had already found it expedient to give way. She too had attempted to erect the same office, and the Judges of the day had refused obedience to letters and privy seals ordering them to receive the patentee into his office. The final settlement of the dispute looks like a device of her own, for extricating herself with as much dignity and as little loss of power as might be. A fresh command was sent that the Judges should receive Cavendish, the patentee, or appear before the Chancellor and the Master of the Rolls to state the reason of their refusal. They did so, citing Magna Charta — that no man shall be disseised of his freehold, — "and the queen was satisfied."[2]

Whether this case was known to Bacon before the argument in Trin. Term, when it was alleged on the other side, does not appear.[3] But the course which he took from the first, not only made it impossible for him to recede without some disgrace to the King, but brought in question the limits of a much more important claim of the prerogative than that of re-modelling the offices of the Common Law Courts without the assent of

[1] *Infrà*. p. 700.

[2] Rolle, p. 206., gives the fullest account of this case, but all the other Reporters mention it. If Brownlow had come into office after Michell, the particular ground on which the Judges rested their refusal would not have applied in Michell's case, though it would still have been rash to renew the dispute.

[3] While these pages were passing through the press, I found in Harl. MSS. 1756. (a volume containing some of Bacon's works), p. 548., a report of Cavendish's case, which may very well be Anderson's, which was mentioned in the Court. It seems there was no formal decision: but the Chancellor and Master of the Rolls reported "their good allowance" of the Judge's reasons, which the Reporter "heard her Majesty did well accept," and nothing more was heard of the matter.

Parliament, whether with or without consideration of vested rights. When asking time to plead, he described the original question in the cause as affecting one of the "four columns of the prerogative,"—viz. that concerning matters judicial,—"which he should ever maintain according to his place:" and when the time for pleading came he and the solicitor-general appeared with a formal message from the King and presented the writ *de non procedendo*. He endeavoured to stop any argument on the writ, insisting it was peremptory and not to be questioned: this was overruled, and the matter was argued on the other side, and for the Crown by the solicitor-general, in Trin. Term; and finally Bacon was heard in Hil. Term, Jan. 25th. The reporters say both sides were very confident of success: Bacon thought he had produced a great effect; but nevertheless, "because the times were as they were," recommended the King, who had interfered once or twice with the cause before, to reiterate his command that the Chief Justice, having heard the attorney-general, should forbear further proceeding till he had communicated with his Majesty. It will be seen that in his argument he treats the writ as concerning rather the dignity than the substantial power of the Crown:—Mr. Brownlow would have his cause heard on the Common Law side of Chancery, instead of in the King's Bench, and no doubt would have justice done to him. But in his letter to the King he explains that the chief importance of the proceedings was in bringing any case that might concern the King, in profit or in power, from the ordinary benches to the Chancellor, who (as the King knew) "is ever a principal counsellor and instrument of monarchy, of immediate dependence on the king."

The Judges did not dispute, nor could they, that there were abundant precedents of this writ. The only question, had they proceeded to judgment, would have been whether they could see their way to have fixed some reasonable and constitutional bounds, definable by law, within which it was to be allowed. Bacon, it will be observed, had at first contended that the writ was to be obeyed without any opportunity of discussion: in other words that the mandatory part alone was to be looked at. When beaten from this, he here argues that it was only necessary that it should assert that the King had a right, and should show that, if it existed, the case touched it; the Chancellor being thereupon made the judge whether such a

right should be recognised — thus making him in fact the sole and unchecked expositor of the constitution in all such points as could in any way affect private rights.

No decision was given. The case was compromised, at whose instigation we are not informed; but the substance of the arrangement is mentioned by the reporters, and is most authentically expressed in the Warrant Book, in the S. P. O.[1]

It recites the purport of the patent to Michell for making the writs of *Supersedeas*, "the making whereof the Prothonotaries and Exigenters pretended to belong to them only, and commenced a suit in the K. B. which yet dependeth undecided;" and states "that they nevertheless by humble petition make a free and voluntary offer to cease their suit, and consent that the said office shall be established and enjoyed by the said patentee; humbly beseeching We would be pleased to make some declaration of our royal determination, under our privy seal, to our Judges, that we will not admit any such suits hereafter that may tend to the granting away, abatement, or diminution of any of the profits, or preeminences which the Judges, officers, or clerks of the said Court do now hold and enjoy (other than the said place and office aforesaid). Which their petition we cannot but, according to our princely inclination, take in good part, as proceeding from men that do well discern what befits them to do, and what they may expect upon an offer so full of duty and good manners." And the King proceeds to make the declaration accordingly.[2]

So that, in the end, Murray and his friend kept their profits; the King forbad himself, under penalty of breaking his recorded faith, the exercise of his alleged prerogative of ordering the course of the Common Pleas offices; and his claim to issue his writ *de non procedendo Rege inconsulto*, unquestionable in the Courts of Law, remained where it had been, or was made less tenable for the future by not being in this case acknowledged.

[1] Undated, and referred in the Calendar to Sept. 1611; I presume because of its obvious connection with the Docket of that date already cited. I do not understand how the documents came to be transcribed into this Warrant Book in the confused order in which they stand.

[2] The note of a grant to Michell of the office of keeping the seal and signing of writs in the Common Pleas, during pleasure, dated April 19th, 1616, appears in the Grant Book; which I suppose to mean the same office as before, regranted.

THE ARGUMENT

OF

SIR FRANCIS BACON, KNIGHT,

ATTORNEY-GENERAL IN THE KING'S BENCH,

IN THE CASE DE REGE INCONSULTO,

BETWEEN BROWNLOW AND MICHELL.

THIS case hath been well handled on the other side, if that may be said to be handled which, in the chief points, is scarcely touched: neither do I impute that to Mr. Croke, that argued; who I know is learned, and hath taken a great deal of pains; but *ex nihilo nihil fit;* the fault was in the stuff, not in the workman: yet this I must say, that it is a strange form of proof to put a number of cases where this writ hath been obeyed, which is directly against you; and then to feign to yourself what was the reason why it was obeyed, and to go on and imagine that if it had been thus and thus it would not have been obeyed. Sir, the story is good; but your poetry why it was done, and what should have been done if the case had differed,—therein you do but please yourself; it will never move the Court at all.

Now I shall answer you so fully, as neither reason nor authority, which you have made and alledged, shall pass. But first I will confirm the truth of that I hold; and incidentally in the proper place confute and encounter every objection that hath been or can be made; for, *rectum est judex sui et obliqui.*

The writ of *non procedendo rege inconsulto.*

My lords, this writ *de non procedendo ad assisam, rege inconsulto,* is in its nature a mere-stone of the king's inheritance, and as a hedge about his vineyard; and therefore it is good to

take the oracle of the wise man against alterations, *qui volvit lapidem revertet super eum; et qui tollit sepem eum mordebit serpens;* he that removes a stone, it will turn upon him and crush him; and he that takes away an hedge, a serpent bred in that hedge shall bite him. But I little doubt by the help of this Court, that this stone shall remain in the ancient term and bound, and that the hedge and fence shall continue in full repair.

The antiquity and worth of the writ.

But as the Court said at the first truly, that this writ is not new, so I say again that the disallowance of this writ should be new; for I will maintain this universal negative, that since the law was law, this writ was never disallowed, but in the excepted case of an act of parliament. Evermore it hath closed, not the judges mouths, but that sometimes they have spoken in it, but ever their hands, that they never proceeded till they had leave; therefore if that should be done which was never done, it must be either in

The King's Counsel, the Court, or, the matter itself.

For the King's Counsel, we are the king's poor servants; but yet we shall be able so to carry the king's business, as it shall not die in our hands.

For the Court, it is our strength; they are sworn to the King's rights and regalities, and if we should fail they (*ex officio*) ought to supply; much more will they aid us, we failing not. The judges of the land, as they are the principal instruments of obedience towards the king in others, so have they ever been principal examples of obedience to the king in themselves. The twelve judges may be compared to the twelve lions supporting Solomon's throne; in that kind is their stoutness to be shown, as it hath been now of late in a great business to their great honour; and therefore in the Court I am sure the let will not be.

It rests then only that it must be in the matter; and this now shall be my labour to make plain, that in the matter it cannot be; wherein, my lord and the rest, if I have thought no pains too much, I beseech you think no time too long.

Four causes.

The proofs that I will deduce shall be from four causes of this writ, for they of all other places of argument are the strongest, like to a fortification from an higher ground: for all other places, *ab effectis, ab adjunctis, a simili, &c.* they are but from flats and even grounds; but the argument from the causes are *à prænotioribus*, as from the chiefest commanding ground.

I will therefore open unto you, first, the end of this writ, the efficient of it, the matter of it, and the form of it; and out of all these I will prove most clearly the present case. Which parts before I deduce, I will give you at the first entrance a form or abstract of them all four, that, forethinking what you shall hear, the proof may strike upon your minds as prepared.

1. The end. The end of this matter is no other than the justest thing in the world, to prevent and provide that the king's rights be not questioned or prejudged in suits between common persons, the king not being made party, but that the impleading and discussing of the same be in the proper suit, court, or course.

2. The efficient. The efficient of this writ is that same *primogenita pars legis* which we call the king's prerogative: and, namely, that branch of it which is the king's prerogative in suits; for the common law of England (which is an old servant of the Crown) as it entertaineth his Majesty well and nobly wheresoever it meeteth him, in the very region and element of law, which is his judicial courts and suits, it welcometh him with a number of worthy prerogatives agreeable to monarchy, and yet agreeable to justice.

3. The matter. The matter of this writ is always loss and damage to the king, or possibility of loss and damage; wherein the law is provident, that it doth not so look to the present loss of the king, as it forgetteth future; nor so look to direct loss, as it forgetteth losses collateral, or by consequence; but is (as I said at first), by means of this writ, as a firm and perfect hedge or wall round about every side of the king's inheritances and rights; and therefore I say, as I have often said, that Hampton-court, or Windsor-castle, is not so valuable to the king as this writ.

The writ hath two parts, the certificate or recital of the king's title called in question, and the precept or mandative part; both which I will maintain to be sufficient, and warranted by law: but this part, concerning the form of the writ, induceth question of matter precedent and matter subsequent. The matter precedent is the king's title; the matter subsequent is the court's obedience; of both which also it is necessary to speak: upon which parts, when you have heard me, I hope to leave the court without all scruple, and fully fortified, not only in the matter, but in myself, that I speak not officiously in this case, or as a man that would make any thing good, but

with science and conscience, and according to that I read and find.

1st. The end. For the first part, therefore, which is the final cause for which this writ by law is devised and ordained, I will set forth unto you four things:

First, I will clear an error, or remove a mistaking, for that I will shew you that this writ is not a delay of justice, as it hath been conceived, but a direction of justice, turning of justice into the right way.

Second, Then I will lay down my ground, which is sound and infallible, that the king's title shall never be discussed in a plea between common persons, the king not made party.

Thirdly, I will shew you in what court, and in what manner, the king is to be made party.

Lastly, I will make it plain, that in this present case, in the assise between Brownlow and Michell, a right of the king, both in profit and power, and that valuable, and that of a very high nature, is to come in question to be discussed.

So then, the full of this argument will be, wheresoever the king's right is to be questioned, in a plea between party and party, there, after the writ of *rege inconsulto* purchased, the court ought not to proceed: but in this assise between Brownlow and Michell the king's right falls out to be questioned; *ergo*, in this assise the court ought not to proceed.

This is a course plain and perspicuous, my lord; it is a wise saying, *sapiens incipit a fine;* so the mistaking (whether voluntary or ignorant, but gross and idle I am sure) of the end and use of this writ hath bred a great buzz, and a kind of amazement, as if this were a work of absolute power, or a strain of the prerogative, or a checking or shocking of justice, or an infinite delay; as if Mr. Brownlow must[1] sit down and expect the good hour, and had no means to help himself; or as if all causes might thus be charmed asleep, and the wheel of justice arrested at pleasure; or that the statute of 2 E. 3. c. 8. *that justice should not stay for great seal nor little seal,* should suffer violence; and such other popular and idle blasts.

Now all this mist is soon scattered, when the state of the question is known, and truly expounded, which is no more but this, Whether the king's right to create and constitute a proper office for the making of *supersedeas quia improvidè*, and appoint-

[Whether the king may create an office.]

[1] "not" follows in the print.

ing a reasonable fee to the same, and the king's property and royalty in the gift of the said office in perpetuity, shall be tried between Brownlow and Michell in the king's bench, or between Brownlow and the king in chancery?

So here is all this great matter, *mutatio fori et partis;* and therefore this writ is no dilatory or stay of suit, but the removing of a suit, whereby justice moves on still in a straight line; it giveth the party a better suit in disabling the present suit.

That this is so, you shall find it notably proved in *Arden* and *Darcy's* case, 38 Eliz. rot. 1128. which was the latest case of this writ. There when the counsel of Arden alledged that this writ was a delay of justice, and that it was against the statute of 2 E. 3. that the judge should not stay for great seal nor petty seal, and chanted upon this ground; my lord Anderson and the rest of the court stopped that allegation, and said, just as I say now, that to obey this writ is not to delay justice to the subject, but to do justice to the king, and to draw justice to the right way; even as, should I stay and stop the water of the Thames or of a river from going into a by-let or creek, to make it run the better in the right channel, this were no stopping the stream, but guiding it; and I tell you plainly it is little better than a by-let or crooked creek, to try whether the king hath power to erect this office, in an assise between Brownlow and Michell.

This writ is not to gain the king time, but to alter the course.

So then let it be understood, that this writ is not to gain the king a little time to provide how to make his defence, and so to go on in this court, but plainly an alteration of the suit and of the court. As Mr. Solicitor said prettily, the king saith now to the plaintiff, *in me convertite ferrum, nihil iste, nec ausus, nec potuit;* Mr. Michell is now no more your adversary, but you must plead with the King. Marry, I differ from Mr. Solicitor in that other point, that he thought the writ had been naught, if it had not the clause *donec aliud habueritis in mandatis;* for indeed I chose[1] that form as the fairest and most corrected; but I can shew many precedents without it; for it is ever understood, though it be not expressed: for if the suit do fall out against the king in the chancery, then indeed you shall have *aliud mandatum,* that is a *procedendo;* but if it fall out for the king in the chancery, then your *donec* is like the

[1] "chuse" as printed.

donec of the Scripture, *donec solvit ultimum dodrantem*, that is, never; for you shall never have *aliud mandatum*, but you shall have *iteratum mandatum* of a *supersedeas omnino*. But all this grows upon the same error, that men speak as if this writ were a mere dilatory, for then indeed Mr. Solicitor says well, delays may not be infinite; but this is no dilatory but a directory, I say a direction and reduction of justice from obliquity and circuity into a direct path; that is, to try the king's right in a plea with the king. So much for the discharge of the erroneous conceit of this writ.

The king must be made party, where his right cometh in question.

Now I come to the second point of my first part, which is, that where the king's right is questioned, he must be made party: for this, *res ipsa loquitur vel potiùs clamat*, the king shall not be surprised, nor stricken upon his back, nor made *accessorium quiddam* to the suit of another. If Mr. Michell pretend to have right to the possession of the office of the *supersedeas* and fee for the present by the king's grant, and the king pretends to the gift of it afterwards, the king shall not depend upon Mr. Michell's suit, but Mr. Michell upon the king's suit; and although Mr. Michell's right be present, and the king's to come, yet posteriority in the king's case is always preferred: the rule ever holds between the king and the subject, *that which is last shall be first, and that is first shall be last.* For the books, they do so receive this maxim, and lay it for a law fundamental, and ground infallible, as I will not authorize principles. The best books are 39 E. 3. fol. 12., 31 E. 3. Fitz: *aide de roy, pl.* 69. 7 H. 4, fo. 18. &c. These books have it, *disertis verbis*, and *in terminis terminantibus*, that the king's right shall not be tried, except he be made party; and the judges make a wonder of it, when they are pressed, *What would you have us do by the king's right without making him party?* But the cases that are not so vulgar, and yet do excellently express this learning, those I think worthy the putting.

The king's right is ever the principal, though it be last in time.

Aid shall be where the land is conveyed hanging the suit.

As, first, 12. *Assise, pl.* 41., the tenant in a *præcipe* conveyed the land to the king hanging the writ, and thereupon prayed aid of the king; and the court granted it; and two several judgments (saith Brooke[1]) were vouched for it. This is somewhat a strange case, and the hardest case that can be devised or put, of making the king party.

[1] Printed "Choke." See Brooke *Aid del Roy*, pl. 71., whence I take the reference, which is wrongly given as 12 Ass. pl. 49. I have not generally verified the references, except by the aid of Brooke and Fitzherbert: and I fear there are many errors.

For, first, the relation of the writ avoids all mean conveyances, *by maxim.*

Again, the act of the tenant ought not[1] to prejudice the demandant, as touching the tenancy, *by maxim;* and yet, nevertheless, this other maxim which we have now in hand, *that the king's right shall not be tried, except he be made party,* is stronger than the other two, and in law mates them: but Brooke, like a grave judge, in abridging the case saith, that the king is not in justice tied to give him aid, except he please; which I conceive to be in regard of the mischief of maintenance.

The other case is an excellent case, and gives light by contraries; and that is the case of 15 *H.* 7. *fo.* 10. where the king granted a wardship to *J. S.* and there was a traverse put into the office, by one that pretended right; and a *scire facias* went out against the patentee, that had the grant of the wardship of the land, who came in and pleaded his estate by letters patents, and prayed in aid of the king. Saith the court, "Clearly you "shall have no aid; you are at no mischief, for the king is "party already, and you may *consult* with him." So you see plainly, that where the original suit is in the chancery, whereby the king is party already, there the law hath its effect without circuity; and therefore, *à contrariis,* where he is not originally party, he must be made party. [Fitz. aid de Roy, pl. 98.]

Now for the reason of this, that the king must be made party in a number of cases where a subject, if he were in the like case, should not have aid, but must abide the event of the first suit; it is, no doubt, partly in point of honour, because the law accounts the king's title, where it is connected with the right of the subject, to be the principal; like as in mines gold draws the copper, which is the subject though it be in less quantity; and partly and chiefly for the salvation of the king's rights.

For the king hath a number of privileges and prerogatives in his suits which the subject hath not. Thus his counsel shall be called to it, who are conversant and exercised in the learning of his prerogative, wherein common pleaders, be they never so good, are to seek; and in the pleadings and proceedings themselves of the king's suits, what a garland of prerogatives doth the law put upon them. Again, the king shall be informed of all his adversary's titles;

[1] I have inserted this negative.

the king's plea cannot be double, he may make as many titles as he will; the king's demurrer is not peremptory; he may waive it and join issue, and go back from law to fact:— with infinite others. Will you strip the king of all these, and make them as ordained in vain, by questioning his right in a suit between common persons, which have no such privileges? This, indeed, is *læsa majestas;* for he that will tell me that the king's right shall be tried between *J. S.* and *J. D.* I will think him alike of kin to Jack Cade or Jack Straw.

How the King shall be made party.

This foundation being laid, that the king must be made party, then followeth the third point, which is, How he shall be made party?

It follows therefore of itself, *ex quâdam necessitate adamantinâ*, that the case can be held no longer in the Common Pleas or this Court, for you will not revive old fables (as Justinian calls things of that nature), *Præcipe Henrico regi, &c. Præcipe Jacobo regi, &c.* That you will not do; and yet it comes to that, if the king should be made a defender in this court, either directly or indirectly, as by *aid prayer.* Why then it follows that the suit must be in the Chancery, where suits are tried properly, where the king is never upon defence, and where the king's rights or charters are tried likewise properly; for there are petitions of right discussed; there are declarations of right, which we call *monstraunces de droit*, sued; there are traverses to offices; and there are *scire facias* brought for repealing letters patents: for you may not come with a *queritur* against the king, but you must humbly *supplicate* unto him, or modestly *disclose*, and lay before him your right, or civilly offer a *negative* of his right, as it is found. These be the ways that you must proceed in, when you have to deal with the majesty of a king; and for this, without all scruple, the Chancery is the court; the Chancery, I mean, in that capacity where it proceeds as a common law court, and not as a court of equity.

And this you see by all the books shall not be only in the case of a mere suit, where the king is only party; but in a mixed suit, where the king is party together with a subject, as in the case of *aid.*

Now then, if any man be so subtilely ignorant (for there is a kind of subtile ignorance) as to think that the drawing of the suit into the chancery should be in case of the *aid*, and not of the plea of *rege inconsulto;* or in the plea of *rege inconsulto*,

but not where the writ is brought; he is a stranger to the books, neither doth he advise the consequence of that he says.

For, first, this is a ground that strikes silence into any man, and cannot be replied unto, *that whatsoever advantage the king may have upon the prayer of the party, the same or higher he must have upon his own writ;* else you expose and abandon the king's rights to the neglect or collusion of the party, and you allow the king to help another and will not allow him to help himself, which is more than absurd; and therefore the ground is sound and certain, that *wheresoever you may have the* AID *or the* PLEA, *there you shall have the* WRIT; *but not* E CONVERSO: for the king shall not watch with the eyes of the party, but with his own eyes and his counsel's.

Now to come to the authorities: for the *aid* I will not speak of them, because that is without colour or question; but for the *plea*, and for the *writ*, I will shew you plainly and plentifully, that the rule of the court, and the rule, or dismission (as I may term it), of the court, when the king's right is once in question (*et dies datus est ad, &c. et iterum sequatur penes ipsum regem*, which is ever understood of the Chancery), is not only in case of *aid*, but is common to the *rege inconsulto*, either by *plea*, or by *office* of court, or by *writ*.

First, For the plea of judgment *si rege inconsulto*, you shall find, that although that plea and the *aid prayer* differ in the conclusion of the party, yet that the act of the court, and that which the court doth thereupon, is the same thing. For it is true, that if the party's state be too feeble to pray an aid, as when he is a copyholder and the like; or, on the other side, where the king's estate is too feeble to bear the nature of an aid, as when the lands are seised in respect of the king's tenant's alienation, whom he licensed, or in respect of the Prior alien or the like; in all these cases the proper and natural conclusion of the party's plea ought to be, *petit judicium, si rege inconsulto, &c.* and not *petit auxilium, &c.*: but the effect that follows thereupon is all one; for the court ceaseth, and the rule is, *sequatur penes ipsum regem*, and the court's hands are closed till a *procedendo* come. Nay, if you look advisedly into the books, you shall see that that which the court doth upon the *rege inconsulto* is termed *granting of an aid*, indifferently and promiscuously, as well as upon the *aid prayer* itself; for so are the books, which I cite unto you truly and punctually, of 3. Ass.

pl. 1. 11 H. 4. fo. 39. 27 H. 8. fo. 10. in the which books the conclusion of the plea is, judgment *si le roy nient conseil;* and for the act of the court, the books *in terminis terminantibus* are thus, *et pleide fuit et habuit auxilium.*

And therefore for Thorpe's opinion, that is in 28. of this book of Assise, fol. 39. *Turpin's Case,* you must either give it a favourable construction, or else you must bury it, and damn it under a heap of authorities.

The case was, that in an assise the defendant pleaded the charter of K. R. by the words *concessimus et dimissimus,* and not by *dedimus, tenenda* by certain services, and not by any rent, and so prayed in aid. Saith Skipwith, the more natural conclusion had been, *judgment if the king not consulted with;* which, no doubt, he meant, because there was in the charter neither word *dedimus* nor any rent: but what was done? The plea was adjourned, *et interim suer al Roy,* for the book is misprinted B. for R. which is easy to miss in the Dutch letter, for the R. is with the foot turned out, and the B. is with the foot turned in; but Brooke, in abridging it, hath it plainer, *sequatur penes ipsum regem,* and the other hath no sense.

[Aid del Roy, pl. 78.]

Then follows a corollary of Thorpe's, being a kind of voluntary of his own; "There is a great difference between the *aid* "and the *rege inconsulto;* for in the *aid* you must plead to the "king himself, but in the other not." This if Thorpe meant thus, — that in the case of the *aid* the king was in justice bound to take upon him the plea, whereas in the case of the *rege inconsulto* it is in his pleasure to waive the defence of the suit, and to grant a *procedendo,* — he saith somewhat; for the *aid* is the more obligatory to the king: but if he meant, that in the case of the *aid* the plea shall be discussed in the chancery, and in the case of the *rege inconsulto* it shall not, but that the king's counsel shall be assigned to the party, and so to go on in the first court; then it is (let me speak with reverence) but about sun-set, for clearly it is no law.

For, first, it is repugnant to the very case itself; for if so, then the court had not concluded *sequatur penes ipsum regem,* but to have denied the aid.

Secondly, The authorities are infinite against it, which are, beside the cases I vouched before this, 22. Ass. *pl.* 5. the same year, *pl.* 7. 39 E. 3. fo. 7. 7 H. 4. fo. 45. Ass. *pl.* 21. the same year, *pl.* 18. 45 H. 5. fo. 11. 21 H. 7. fo. 3. and infinite others.

In all which books, upon the plea of *rege inconsulto,* the rule and pale of the court is the plea, or *de abundant*[1] *suer al roy.*

Now for the writ itself: it is the like case, but much stronger. For the writ doth absolutely close the hands of the court; and then the subjects must have a suit that must be private or loyal[2]: not private, *ergo* loyal[2]; for that the suit should be in private to the king to have a *procedendo, absit verbum;* for God forbid that, upon the calling of Mr. Attorney or Mr. Solicitor, in the gallery, the king should determine the right of the subject; for wheresoever the law giveth the subject a right, it giveth a remedy in open court legally.

Two kinds of this writ.

It is true the writ, in the present case thereof, admits a subdivision: the one kind where it is purchased by the party in corroboration of his plea, either of *rege inconsulto,* or of aid; the other is a writ which proceedeth from the case of the King's Attorney, and is substantive in itself, and not induced by the plea of the party.

I will give you the books of these. For the writ induced by the plea you have 8. Ass. *pl.* 16. 22. Ass. *pl.* 24. 40. Ass. *pl.* 14. 46 E. 3. fo. 19. 35 H. 6. fo. 44. For the other writ you have 21 E. 3. fo. 24. and 1 R. 3. fo. 13. Arden's case.

Now to conclude this part, and to give the court a better light, I will put you the differences between the plea and the writ, which are three.

First, The plea ariseth from the vigilance of the party, to draw on the king to his aid; the writ ariseth from the providence and caution of the king, to save himself, and likewise to protect the party.

Secondly, The plea must come before issue; for you shall never force the king to maintain the issue of the party, but it must come *tanquam res integra* to him, to take his own issue, as is 7 E. 4. fo.——[3]; but the writ may come any time before judgment.

And, thirdly, The plea must be grounded upon some record that appears of the king's title, or at least upon some examination of *authorities,* such as the law allows; and this may be counterpleaded; but the certificate of the writ is peremptory, and not to be counterpleaded. But of that hereafter:

[1] So printed. I do not understand it.
[2] So printed. Perhaps law French for "legal."
[3] So printed. But the reference is probably to 5 Ed. 4 fo. 1. See Br. *Aid del Roy,* pl. 102.

it sufficeth now that I have proved (if law be law) that upon the *aid*, and upon the *plea* with the writ, and upon the *writ* without the plea; I say that, in all these cases, you must sue in the Latin court in chancery, and there plead with the king himself, *penes ipsum regem;* so that all that troubles us is no more but this, that when Mr. Brownlow goes up Westminster-hall hereafter, he shall turn a little upon his right-hand, and all shall be well.

Now if Mr. Brownlow shall ask me, whether the record itself in this court shall be in all these cases removed into the chancery? or whether a suit *de novo?* or, what shall be the course? I am not bound to read him a lecture what he shall do: and yet, lest you should be discouraged above measure, and think that it should be in the nature of a petition of right, which is a long suit, I will comfort you with some precedents of a more summary proceeding.

In the time of Philip and Mary, 3. and 4. between Jones and Ecks, in a *quare impedit* brought by Jones, the suit was stayed upon disclosure of the patronage to be in the king; the rule was given in this manner: *Et super hoc dies datus fuit partibus prædictis in Sti. Martini in statu quo nunc; et dictum fuit præfato Willielmo Jones quod sequeretur interim penes dominum regem et dominam reginam: et super hoc prædictus Will. Jones venit coram rege in cancellariâ et petit breve de procedendo; super quo quæsitum fuit ab Ed. Griffith attornato regis generali, qui pro rege in hâc parte sequitur, si aliud pro rege habuit aut dicere scivit, aut potuit, quare dictum breve de procedendo præfato Will. Jones in eâ parte minimè concederetur. Qui quidem Ed. Griffith adtunc et ibidem nihil dixit, aut dicere scivit, aut potuit, quamobrem prædictum breve de procedendo eidem Willielmo in eâ parte non concederetur.* And so a *procedendo* granted. The like record in an action of trespass between Maurice and Hazard, of a house called the White Horse in Lynn Regis, brought in this court, which had been granted by king Hen. 7 to the town of Lynn Regis, with a rent reserved; and sir Gilbert Gerrard called to it in the chancery, and upon his *non dicit* a *procedendo.* The like 35 Eliz. between Gascoigne and Pierson, in trespass in this court; the tenement in question was Ontobie; and sir John Brograve called to it, who gave way, and a *procedendo.*

Now for the minor proposition, Whether the king's title

come in question? No man can contradict it; for the question will be, Whether Mr. Michell hath disseised Mr. Brownlow of his fee? Mr. Michell must justify the king's letters patents made to him for his life of the office of clerk to write the writs of *supersedeas*, together with the fees accustomed: then the main question of the title must be, Whether the king may erect this office? and, Whether the king shall have a perpetual inheritance to confer it when it falleth?

So that this is a title of exceeding importance to the king; for the axe is put to the root of the tree, which root hath three strings: first, matter of profit; secondly, matter of power; thirdly, matter of example or consequence.

First, Matter of profit in the gift of this particular office. Secondly, matter of power: thus the question is, Whether the king, being head of justice and judicature, may not in his own courts collect into an office, and make a proper office for that which was *vagum quiddam*, and loosely and promiscuously executed and done by clerks before? Thirdly, Matter of example or consequence; for this leadeth to the overthrow, at the least, of ten letters patents of like nature already past, enjoyed, and settled, which I will now specify and enumerate unto you.

The patent of *subpœnas* in the Chancery, which formerly were written by all clerks that writ to that court, and was collected into an office in the 17th year of Queen Elizabeth, and granted to George and Mark Williams.

The *subpœnas* out of the star-chamber, which both the clerks, under-clerks, and attornies of the court indifferently wrote, were collected into an office, and granted to Cotton, 1 Eliz.

The writing of *diem solvit extremum*, which is a legal writ, and for the subject as well as the king, which clerks of the petty bag did write, was collected into an office, and granted to Ludlowe and Dyer, 13 Eliz. 27 Martii.

The licence of alienation, formerly written by the clerks of the petty bag and the cursitor clerks, drawn into an office, and granted unto Edward Bacon, 13 Eliz. 23 April.

The writing of the *supplicavit supersedeas*, for the good behaviour of the peace, granted to sir George Cary, 33 Eliz. 1 Oct.

The writing of letters missive to York, granted to Lerton, in the King's time, 14 June, 4 Jac.

The writing of affidavits, drawn into an office, and granted to sir James Sutterton, 20 April, 13 Jac.

The making of extents upon the statutes staple in Queen Elizabeth's time.

The making of commissions to the delegates, in appeals from sentence ecclesiastical, in Queen Elizabeth's time.

That famous erection and constitution of the cursitors for original writs, which was attributed to my father as a great service, in the beginning of Queen Elizabeth's time, though afterwards it was confirmed by act of parliament.

There be more, but I will not be exact in enumeration. My lord, for my part none of all these, no not this of Michell's now in question, ever passed my hands; they went all either before me or beside me, but, by the grace of God, I shall be able to defend them; for now, Mr. Brownlow, if you will overthrow all these, and lay open all these inclosures again, and become a kind of leveller, then we must look to you.

Now let the court judge, whether these be not a title whereto the king ought to be made a party, which is the only end and final cause of this writ; and so I leave that main part.

2ndly. Of the efficient cause.

Now do I proceed to my second part, which is to be the efficient cause of this writ, which I declared to be the king's prerogative.

This were a large field to enter into, and therefore I will only chuse such a walk or way in it as leadeth pertinently to the question in hand: wherein I will stand only on four prerogatives, which have a great affinity with that prerogative that did beget this writ; and in every of them I will conclude this cause *tanquam à fortiori.*

The first is in the liberty and choice the king hath to sue in what court he will; whereupon I make this observation, that if the king may sue in what court he will where he is demandant, *à fortiori* he may draw a plea from another court where he is upon his defence.

The second is the prerogative which the king hath of dilatories; whereupon I infer thus, that if the king in many cases may stay a suit simply and absolutely, *à fortiori* he may remove a suit to the proper court in his own case.

The third is that slow motion and gradation which the law hath devised and introduced in that which is the subject of the

present disputation, namely, in the *aid* and in the *rege inconsulto:* which is this; the law hath devised that there must be a double *procedendo;* first, *in loquelâ* only; then, *ad judicium.* Whereupon I conclude, that if when there appears a cause of a *procedendo,* yet the suit shall not be at full liberty, but it is but as the opening of a double lock; *à fortiori* it is reason to arrest it at the beginning, before any cause of *procedendo* shewed.

And the last is some precedents of extraordinary mandates of the king in matters of justice, in cases where the king was not the party interested; whereupon I will also conclude, that if the king, out of his great power of administration and regiment of justice, when he is not interested, may make such mandate, *à fortiori* he may do it where he is interested, and where his disinherison cometh in question.

It is a great prerogative in opening of justice that the king may enter by what gate he will, and that the statute of *Magna Charta, communia placita non sequantur curiam nostram,* bindeth not the king; as if the king will bring a writ of escheat, which is merely a common plea, he may bring it in his court of the king's bench; which no subject can do. So is *Fitzherbert, Nat. Brev.* fo. 17. in his writ of right in London. So may he bring his *quare impedit, Ibid.* fo. 32. where you shall see the general ground is taken, that the king may sue that writ where it please him, according to the book of 46 E. 3. fo. 12. by Finchedon, and divers other books. So that *electio fori,* which otherwise is limited and distributed where there are courts for several suits, is ever the king's.

Now then I conclude, *ut supra,* that the king shall lead and not be led; and that if the king shall have choice of his courts upon his demand, much more shall he have it upon his defence; for, as the Civilian saith well, *in petitione periclitatur lucrum, in defensione periclitatur damnum,* in the one case the king striveth for that he hath not, in the other case he is in hazard to lose that he hath.

For the second prerogative of mere dilatories, I will first put the case of the tenants of Northumberland. The tenants and inhabitants of Northumberland were so vexed by war with Scotland, that they could not till their lands; they were fain to betake themselves from the plough to the sword, *et curvæ rigidum falces conflantur in ensem;* whereupon the landlords

brought their *cessavit*, because the land laid fresh, and they could not distrain for their rents and services. The king sends his mandates to the chancery, that no *cessavit* shall be granted; and to the judges of the common pleas, that if any *cessavit* come, they shall surcease the plea; and both courts hold it good.

In 22. Ass. pl. 9. the king's writ came, reciting, that it was ordained by the king and the great men of the realm, that an assise brought against any that were in the king's service in France should be stayed, and certifying that the defendant was at Calais in the king's service, and commanding the judges to discontinue the assise; and obeyed, notwithstanding, saith the book, the statute of 1 Ed. 3. that neither for great seal nor privy seal the court shall surcease; for that was meant in respect of letters and consideration of favour between party and party, and not of mandates of state or upon legal interest in the king.

So I find a record in the exchequer, 17 E. 3. *Rot. Hiberniæ* 13. The citizens of Dublin sued Will. de Canall, who brought his writ of error in the king's bench of England. The king, disliking this tossing of justice upon the seas, sent his writ to the justices of this court, commanding *ut supersedeant in probatione errorum ad sectam Will. Canall versus cives de Dublin, et quòd recordum et processus loquelæ prædictæ transmittant justitiariis Hiberniæ.*

The like record I find 17 E. 3. *Rot. Hiberniæ* 37. between Jeffrey Greenfield and Jeanne de Tyrone, *ut supersedeant et transmittant;* and obeyed.

It may be said, that these cases seem to be but a case of point of state; but then take this with you, that the eye of the law of England ever beholds the king's treasure and profit as matter of state, as it is indeed; — they are the sinews of the crown.

The case in 4 E. 3. 19. and again fo. 21. is very notable, taking it with all the circumstances. Sherwood being attainted in redisseisin, and a *capias pro fine regis* awarded, was sued also in trespass, and a *capias pro fine* was awarded likewise in the trespass; whereupon a mandate by privy seal came to the court, reciting the conviction of the redisseisin, commanding the court to grant a *supersedeas* upon the *capias* in the trespass, for that the king would not that Sherwood should be molested or vexed with any process in the king's rights; and yet you know well, that upon the *capias pro fine* the defendant shall be

in execution as well for the party as for the king. When this mandate by privy seal came, the judges were in doubt what to do; and Crompton, the prothonotary, stept forth and said, that heretofore the like writ had come in the time of Fortescue, chief justice, who had disobeyed it. The judges, in the absence of Markham, then chief justice, began a little to bristle, and said, that it was not honourable for the court to waver, and to do one thing today and another thing tomorrow, and therefore they would do nothing till my lord Markham was present, who was judge in Fortescue's time, and he would sit with them the next term, and by the grace of God they would do according to their place and conscience. In Trinity term following, after this storm, Markham quietly, *sine strepitu*, granted the *supersedeas*, according to the king's command, and there is an end.

Now for the third point, it is but a note how wary the law is, after it hath taken notice of the king's title, to proceed; and therefore there must be a duplication of the *procedendo*; first, *in loquelâ*; then, *ad judicium*.

For although in the removing of the suit in the chancery there be no matter at all shewed for the king, yet the law giveth it not over, but is content there be a *procedendo* granted, with a restraint nevertheless that the court shall proceed as far as judgment, and no farther; and still lieth in wait to see what will come of it: and if upon issue or demurrer it finds any life in the case more than appeared in the first, the king may forbear the granting a *procedendo ad judicium;* nay in the meantime, if the defendant plead in chief, in maintenance of the king's title, the king's counsel shall be assigned to him for his better strength.

As to the last branch, that is, extraordinary mandates legal, in suits between party and party, you may see two notable cases to one and the same intent; the one of 1 E. 3. title[1] *Crown*, pl. 125. the other 7 H. 6. fo. 31. where the king gives a direction to the judges what they should do, and prejudges their judgment: for the question being touching the custom of London of waging battle (for which citizens are not so fit); which custom, as all other customs, is subject to the judgment of the court whether it be lawful or no; the king leaveth it not to the court, but by his writ commands the judges to allow

[1] Fitzh. *Coron.* pl. 125. gives the reference to 20 Ed. 3. Pasch., and, as abridged it does not bear on Bacon's point.

this custom, and so upon the matter tells them what they shall judge.

But of all the records that I have seen, that of 3 E. 1. Hil. Rot. 52. is most memorable, and worthy to be a kind of phylactery about the garments of all the judges. There was an assise of *darrein presentment* brought in the court of Chester by the prior of Kirkennett against Alice de Bello Campo, guardian of the body and land of Hamond de Macy, and it was of the church of Bonden. The king directed his writ to Reynold Gray, then justice of Chester, reciting, that whereas the said assise did depend before him, that the king did hold it fit to send down to the said justice there, from hence, *à latere regis* (for so are the words of the record), some discreet and circumspect person that might assist him in the taking of the assise; commanding him to surcease until three weeks, to be accounted from Midsummer then last past, by which time the king might send him such a person as he might think fit. Nevertheless the justice, in contempt of the king's commandment, took the assise before the term prefixed by the king's writ. And as it should seem by the record, this Gray was a kind of popular justice, and was incited and blown up with the speeches of the people about him, who murmured, and said, except he would go on according to the law, they would serve nor appear no more at any court; and so, with great triumph, he took the assise. Upon this, the record of assise by *venire facias* came into this high court of king's bench; and now I will read the words of the record itself, which I hold so memorable, that you may see what your predecessors did.

Et quia prædictus justitiarius non habet aliquam jurisdictionem vel potestatem cognoscendi in aliquâ loquelâ vel capiendi aliquam assisam nisi per prædictum dominum regem et ad ipsius voluntatem, et compertum est per recordum prædictum coram justitiariis domini regis, quòd non obstante mandato domini regis quòd ad captionem præfatæ assisæ non procedat usque ad dies Sancti Johannis Baptistæ prox. præteriť in tres septimanas tamen ad captionem ejusdem assisæ processit, videtur curiæ quòd idem justitiarius in capiendâ assisâ fecit quod de jure non potuit, maximè cùm non fuit, nec esse potuit justitiarius ad placitum illud, contra prædictum mandatum Domini Regis, ante prædictam diem; et ideo consideratum est quòd captio præfatæ assisæ non

præjudicet quoad potuit, et sit in statu ac si prædicta assisa non fuisset.

I will conclude with an higher kind of assistance than the justice of Chester by some person from Westminster, and that was an assistance of the justices of this court by the chancellor and treasurer of England, and that at their own request. The record is this, and it is 31 E. 1. Rot. 46, 47. Henry Newbery levied a fine to Queen Elinor of certain lands in the counties of Somerset and Dorset; the steward and bailiff of the Queen entered, and encroached upon a great deal of other lands that passed not by the fine. Newbery sat quiet as long as Queen Elinor lived; but as soon as she was dead, he questioned the bailiff in this court, and made petition to the King for restitution. The judges discerned somewhat (as it seems) that the party had right; but yet, taking occasion by the insufficiency of some inquisitions in the form of taking them, they thought good to cease, and conclude thus: — "The justices dare not "presume to proceed to their award without a special commis- "sion of the King, which might be to them a warrant of their "award, which nevertheless they would not should be turned "to example in other cases." Thereupon comes a privy seal to Sir William Hambleton chancellor, and the Bishop of Chester treasurer, commanding them to handle the business, and to assist the judges; and according to their opinion the court gave the award.

Now I proceed to my third part, which is, the matter of this writ, which is, the king's loss, for that is the material cause of this writ. 3rdly. Of the material cause.

Now for the king's loss, it may be in present, it may be in future; it may be direct, it may be indirect; and by consequence[1] it may be more, it may be less free; wherein I will shew you that which is worthy the observing; which is, how sharp-sighted the law of England is on the king's behalf to preserve his right from loss: for as it is the quality of a sharp eye to see small things, and things afar off, so you shall find that there is no loss to the king so little, or so remote, but that the law fetcheth it in by this writ; nay, it goeth farther than the natural eye; for the natural eye never sees but in a straight line, but the eye of the law will see the king's loss in a crooked line, be it never so oblique or collateral.

[1] I incline to put the stop here instead of after "indirect;" but I do not understand what is meant by "free." Qu. "sure?"

In this I will now shew you a cloud of authorities, *nubem testium*; nevertheless, because I love not confusion, I will order them thus: I will make unto you a *scala dumni*[1] *regis*, that is to say, a scale or gradation of the king's loss, beginning with the great, and so descending to the less, because of that there is more doubt; and so put a case or two of every kind.

The degrees therefore of the king's loss are in number nine, in every of which cases this writ lies.

The first is, where the king is to lose possession, or present[2] profit.

The second is, where the king is to lose a reversion; and that of two natures, either a true reversion, or a reversion only by conclusion.

The third, where he is to lose seignory, fee farm, or rent reserved.

The fourth is, where he is to lose by way of charging his possessions with any rent or profits, collateral or otherwise, by way of warranty or recompence.

The fifth is, where he is to lose any title, possibility, or contingency.

The sixth is, where the king is to lose any royal patronage, donative, or gift of office; which is our case.

The seventh is, where his title is any where prejudiced, foiled[3], or blemished, or an evidence raised against him, though he lose nothing for the present.

The eighth is, where the king is to lose upon the balance; that is, where he hath benefit two ways, the law will ever protect the greater benefit against the lesser, but not the lesser against the greater.

The ninth, and last, when the king is at no loss at all, but only his charter or patent is questioned, though the interest be wholly out of him: wherein though Mr. Serjeant Chibborne did labour and argue exceedingly well in maintaining that position generally, yet I, for my part, will not defend that point; but, with deference, in every of these I will put some cases the best and most select in the law, because I will not overlay you with numbers.

I will begin therefore where the king loseth possession or profit; and I will take the weakest and superficial kind of possessions and profits.

[1] Printed "*domini*."
[2] Printed "prevent."
[3] Printed "falled."

The Prior of Barncsey[1] was sued for certain land, and pleaded to issue; and at the day when the jury appeared, the Prior brought a writ (as we did in this case) to the justices, purporting, that whereas he was impleaded before them of certain lands, the King gave them to understand, that all the possessions of the said Prior were seized into his hands, because he was an alien of the obedience of France, requiring [them] therefore so circumspectly to deal and behave themselves, that they do nothing that may turn to the king's damage.

Hereupon, although it was pressed by the plaintiff's counsel, that the court might proceed as far as verdict, because the writ imported not that they should stay, but only look about them; yet says Stone, justice, "the King hath given us to "know that the lands are seized into his hands, and therefore "we cannot hold plea between the Prior and you of those "lands which are in the hands of the King;" as who should say, If the king give us leave, yet the law giveth us not leave; "therefore," saith he to that inquest, "God be with you;" and to the party, "Sue to the king."

So here we have the case of this same surface, this superficies of title which the king had by way of pernancy of profits in case of the Prior alien, and yet good ground of this writ.

In a *præcipe quòd reddat*, at the day of the summons returned, the defendant brought a writ out of the chancery, reciting that the land in plea was held of the King by knight's service, and that such a one, the king's tenant, died seised thereof, his heir within age, whereby the lands were seized into the King's hands, commanding the judges not to proceed *rege inconsulto:* hereupon the tenant nevertheless was demanded. Saith Jenney, "To what purpose demand you him? "For if he come not, you cannot have a *grand cape* upon his "default; but you ought to sue to the king." Say Littleton and Choke, judges, "He must be demanded to continue the process."

And the like law is of a *livery* in 11 Hen. 7. fo. .[2] For though it be questioned there, whether the writ of dower be well brought, yet of the aid no doubt is made; but I will grant that the king's interest may be so feeble as the suit shall not stay: and that I learn in the case of 11 H. 6. fo. 13. A man lets land to an Abbot for years, and an assise was brought

[1] 21 E. 4. 14.

[2] So printed; but the reference seems to be to Hil. T. 4 Hen. 7. pl. 1. See Fitz., *Aid del Roy*, pl. 33.

against him of the same land; and the Abbot said that the King had seized his goods and chattels for dilapidations, and had also taken his goods and chattels into his protection; in this case aid was denied: and if the like matter were contained in the writ *de rege inconsulto*, the court, in my opinion, needeth not to stay for the seizure; for dilapidation is matter of ecclesiastical conusance; and the taking of the lands and goods into the king's hands by way of protection is no seizure to the king's use; so that neither of them are such possessions in the king as the law esteemeth, no more than in the case of the outlawry in a personal action. And if an assise be brought against one that is outlawed, and the king recite by his writ the outlawry, and that thereby he takes the profits of the lands, and thereupon commands the court to surcease, in this case I say the court ought not to surcease, for it is no such loss to the king, as the law values; for since the party may discharge the king's interest by feoffment, *à fortiori* it ought not to be any delay to an *issue of*[1] *right*.

Marry, I am of another opinion in the case of the lunatic, although the king hath but the profits upon account, because of the trust the law reposeth in the king for the party.

To proceed to the second degree, where the king is in reversion: if it be a reversion *de facto*, in state, of that I will put no cases; for, *perspicue*[2] *vera non sunt probanda*. But for the reversion by conclusion, it is a juror's case, and therefore fit to have authorities vouched in it. The difference, therefore, is taken in 24 E. 3. fo. 1. and 8 H. 6. fo. 25. and 1 H. 7. fo. 28. that if a man will plead, that the king, by his letters patents, did let unto him for life, or plead that a lease for life was made unto him, the remainder unto the king, and thereupon pray aid, he must in these cases shew letters patents or a deed inrolled; but if he plead positively, and substantively, that he is seised for life, the reversion to the Crown, and prayeth in aid, he needs shew nothing; because, although the king had nothing before, he is entitled to a reversion by conclusion.

This is a wonderful strong case, that an imaginary reversion, by matter of falsity gained hanging the writ, should give[3] cause of aid. And then see[4] the mischief; for it may be a delay in

[1] I have added this word.
[2] Printed *perspicua*.
[3] Printed "have."
[4] Printed "so," and with a comma only after aid.

all cases in the world; no tenant in assise, or other real action, but may keep the demandant in play by this means, and make him plead with the king; yet so tender is the law, that it will not permit this imaginary right of the king to be questioned, without the king be called to it.

Come we now to the third degree of loss, which is when the king loseth seignory, fee-farm rent, or rent reserved. Take for that the case in 35 H. 6. fo. 46. the case between the Bishop of Winchester and the Prior of St. John of Jerusalem: there, in conclusion and judgment in the case, you shall see the difference notably taken by Prisot, that it is not simply a seignory or rent reserved that shall give cause of aid of the king, or ground of a writ or plea of *rege inconsulto*. For that indeed were a mischievous case; for all the king's tenants in England of[1] fee-farms might be in case of aid. But if the title of the plaintiff be paramount before the commencement of the king's seignories or rent, whereby the king may be defeated of his seignories or rent, in whole or in part, by the eviction of the land, and so at loss, there the aid or the writ lieth, and not otherwise: for it is indifferent to the king who be his tenants, so they come all under his seignory or rents.

Upon the like reasons is the book in 31 Ass. pl. 27. where it appears that, if rent be reserved to the king by a lease, and the lessee be bound to bear all charges, out-payments, and allowances, and a corody (as the case there was) is demanded, there the rent shall not give cause of aid; because, although he be evicted, yet the lessee is to pay his rent howsoever, and so the king hath no loss. But if the king had covenanted to have borne out the charge of such incumbrances or out-payments, it had been otherwise.

To proceed to the fourth degree, which is, when the king hath loss collateral. For the warranty, where it is expressed with a clause of recompence, whether in lieu of voucher or of damage, the learnings are so clear, that I will not put the books that the suit shall be to the king. As for the word *dedi*, that it should be a warranty in the king's case, whereas the proper word *warrantizdbimus* will not serve without clause of recompence[2], you shall, I mean, learn to doubt with books against the opinion of 1 H. 7. And for the collateral charge

[1] Printed "or."

[2] Printed with a full stop, and new paragraph.

you may see the book, which is 3 Ass. pl. 1. where an assise was brought of a rent, and the defendant shews that he had the tenements[1] put in view of the lease of the king, and therefore that he conceiveth that there might not be a proceeding without taking counsel of the king: and thereupon the book says, "Note, that in this case the aid is granted of another "thing than that is in demand;" and so no doubt is it of a common, and the like.

The fifth degree was title, possibility, or contingency; as if the king give land upon condition, and a *præcipe* be brought of this land, upon a title paramount the king's condition, &c. I hold in this case the king may stay the proceedings, and bring the suit before him in the chancery, for the safety of the condition. Sure I am, the case in 39 E. 3. fo. 8. is a much harder case, where dower was brought against the guardian, who pleaded that the ward's ancestor held other lands of the king in chief, and died, whereby the king seized and granted unto the tenant *usque ad plenam ætatem hæredis*, and demands judgment, *if the king not consulted with, &c.* In this case, upon debate, the aid was granted; and yet there was no rent reserved upon the patent, neither was there any remainder of the king in the estate, for it was granted until full age; and yet, because there was a possibility, that if the heir did live till full age he should sue his livery out of the king's hands, it was sufficient ground for the aid.

Come we now to the sixth degree, which is, where the king may have loss in respect of his patronage or gift of office, or the like.

For this you may see the case in 38 E. 3. fo. 28. b. the abbot of Lycull's case, where a deanery of the king's advowson was to be charged with an annuity, and a *scire facias* was brought against the dean upon an annuity [recovered[2]] against his predecessor. The dean said, that the king was seised of the advowson of the deanery discharged of the annuity, and that he holds of the collation of the king; and so prayed aid: and after much debate, and divers objections that the writ of *scire facias* was in the nature of execution, and so no time to pray in aid; and again, that the predecessor had aid in the former suit, and so no aid should be in the latter; yet never-

[1] Printed "tenancy." The case is in Br. *Aid del Roy*, pl. 70.
[2] I have added this word.

theless aid was granted; and yet this was no more but a disvaluation of the king's patronage.

But 4 H. 6. fo. 1. is a case far more remote. Pipe brought a writ of entry, and the defendant said, that he was parson of the church of Dale, of the presentment of the Duke of Norfolk, and that the land in question is part of his glebe, and that the Bishop of Norwich is ordinary, which bishopric is vacant, and the temporalties seized into the king's hands, and so remain; and prays in aid of the Duke of Norfolk, as patron, and as to the ordinary, judgment, *whether the king not consulted with, &c.* The book is left at large, for they proceeded not; and yet the seizing of the temporalties had no affinity with the jurisdiction of the ordinary; but, because it did but touch or coast upon the king's right, and because the king is supreme, and the see of the inferior ordinary was void, the court was at a stand.

Now for the office. The best case in the law is 2 H. 7. fo. 7. where it seems the stander by saw more than they that played; for the court erred, and the reporter was in the right, as appears by the adjournment of the cause before all the judges of England, who overthrew the former judgment, and confirmed the law according to the opinion of the reporter.

There the case was, Crofts brought an assise against Edmund Kemperden, and made his plaint of the office of the keeper of the park of Woodstock, and the porter's place there, and made his title by the letters patents of King Ed. IV. The defendant intitled himself by letters patents of King Hen. VII., who granted to him for life, and prayed in aid of the king; and the judges denied the aid: but the same year, fo. 11. before all the judges, the aid was granted.

Place these two books together, and you shall find it amounts to this, that there were two objections made unto the aid. The one, because there was no clause of recompence or any rent reserved; the other, because both parties affirmed the king's title, and so the king was at no loss. To the first the answer is made, that the king, in the present case, hath loss, for that he hath in effect the reversion of the office, that he may grant it when it falls; for (as in Nevill's case) the king may have an office to grant, but not to execute. To the second answer is made, that it might be, the first patent was forfeited (the case being of an office which is subject to a forfeiture), and that

thereupon a seizure was made by the king, and upon that seizure the latter patent was grounded, and so the king's act might come in question; and to justify that, therefore, the king must be a[1] party.

And if you will have a case, not of an office itself, but of an incident to an office (as the other case is of a fee), then you may take the case of Crofts and the lord Beauchamp, 10 H. 7. fo. 38. where the plaint being of a house and land, the tenant shewed a covenant, by deed inrolled, of a grant of an office of forester in tail, the remainder to King Edw. IV., the truth being, that the house and land in question were incident to that office; and so prayed in aid: but there an averment was wanting; and upon that reason only aid could not be granted: but if it had been alleged by the plea, there had been no colour but the aid should be granted, as well in respect of the incident of the office as of the office itself.

To proceed to the seventh degree, which is, where the king loseth nothing, but only his title is prejudiced and blemished, and an evidence raised against it: for that there is one case, *instar omnium*, the famous case of 2 R. 3. fo. 13. b. John Hunston brought an action of the case against John bishop of Ely, for claiming him to be his villein, and for lying in wait to seize him; and the bishop justified, that he was his villein regardant to a certain manor of his see; and thereupon they were at issue; and hanging the plea, the bishop was disabled by parliament, and his temporalties forfeited to the king, who seized them. Hunston went on, and prayed the *nisi prius;* whereupon the king's attorney brought this writ, reciting the whole matter, and how the temporalties were seized into the king's hands, commanding the justices not to proceed *rege inconsulto*. What came of it before all the judges of England? It was agreed, *unanimi consensu*, that the writ should be obeyed; for they said, that although the king upon the action of the case did lose nothing, because the damages did reach[2] but to the party, yet nevertheless if the issue should be found for the plaintiff against the king, that he was not the bishop's villein, it might be a great evidence against the king's title, for the manor itself which was in his hands; so as the court kept aloof, and upon this oblique and remote consequence of prejudice to the king, the court did surcease.

[1] Printed "no."

[2] Printed "trench."

The same learning you shall find in actions of like nature, as trespass, or *quare impedit*, wherein the king loseth nothing for the present, but nevertheless his title may be foiled; and although the books do vary in this point, yet you shall find the more constant resolution as I say. And for the trespass, take the book 9 H. 7. fo. 15. Bryant and Fairfax; and 27 H. 8. fo. 28. by Fitzherbert, "clearly there shall be no proceeding "without making the king[1] a party; no, not in trespass." And the case of 5 H. 7. fo. 16. of the *quare impedit*, which seems to be to the contrary, is justly controlled and questioned by the reporter. But where the king may receive prejudice in his title, not in the same land, but other land upon the same title, it is another case. As if there is land upon the title of the lord Dacres, or the lord Latimer, &c., whereof part is in the Crown, and part out of the Crown, in fee-simple, without rent; if an assise be brought of the land which is out of the Crown, without any rent received, there certainly lies no aid, because it is not of the same thing; neither can that plea between two subjects ever be brought into the chancery; but whether some kind of writ of this nature may not be brought to stay such a suit, you shall give me leave to doubt.

Now to come to the eighth degree of loss, when the king is to lose any balance; it is comparative, where the king hath benefit on both sides, but yet with a disproportion.

I will cite only that notable case which is 1 H. 4. fo. 8. where the case was, that the king had granted the office of measuring of linen cloth and canvas sold between foreigners unto John Butler, taking as Robert Sherwood took; there was an attachment upon prohibition against the mayor and sheriffs of London, for not putting him in possession, according to the clause in his patent: the defendants alleged, that they held the city of the king in fee-farm rendering rent; and that, if this office should take place, their farm should be impaired; and so pray aid of the king. In this case they were ousted of the aid; for that on the one side, if the office should stand, yet they should pay their fee-farm nevertheless; and on the other side, if the office should be overthrown, then the king's reversion and gift of the office should be lost, which should be his disherison, which was not equal: besides that, they were upon

[1] I have added "the king." Brook, *Aid del Roy*, pl. 1, gives the sense, but not the words of the text.

contempt (which is also against the king); and so the aid justly denied.

So if you alter the case in 1 H. 7. and put it that the king granted an office of keepership of a park by several patents, and upon the one patent the rent is reserved, and upon the other none; I say, that in this case, whethersoever of the patents be ancienter or later, the patent that hath the rent shall have the benefit of the aid, in destruction of the other, and not *è converso;* for it is the king's loss that sways the aid.

And for that I can shew a notable record, in a case between the Bishop of Ely and the city of Norwich.

As for the last degree, which is, if the king's charter be questioned, without any manner of loss to the king, that in such case the king must be made party; it is a reverend opinion, and supported with a great deal of authorities; and no doubt it grew from that ancient maxim in Bracton, *In chartis regis non præsumant justitiarii regis disputare, sed tutius est ut expectent sententiam domini regis:* and certainly there are a great number of books on it, whereof the most direct are, 30 Ass. pl. 5. 2 H. 4. fo. 19. 2 H. 4. fo. 25. 33 H. 6. fo. 16.; for as for the books of 38 Ass. fo. 16. 39 E. 3. fo. 11. and 25 Ass. fo. 8. they may receive an answer, and no more perplex.

But I do take the law to be otherwise this day, except it be in charters which are of a higher nature than charters of lands or interest; and this error grew upon a misconstruction of the statute of bigamy; but because this is beyond the case in question, therefore I will not stand upon it: and here I conclude my third principal part.

4th cause. The form of the writ.

Now come I to the last part, which is, *the form* of the writ, which doth require your attention as much or more than the former, because in that part will fall the removing of all the evasions and subterfuges which have been or can be used on the adverse part.

The writ hath, as I said[1] in the beginning, two parts; the recital or certificate, and the precept or mandate. For the

Five points.

first of these, I will divide that which I shall say into five points.

First, I will grant that there must be a recital of the king's title in the writ.

[1] Printed "find." See page 689.

Secondly, I will prove that the king's title recited need not to be grounded upon any precedent record.

Thirdly, I will prove that the certificate of the writ concerning that title is peremptory.

Fourthly, I will prove that you must never question the king's title upon the writ.

And lastly, I will answer some weak objections that have been made, although the affirmative proof doth in itself take them away.

For the first point, I will grant that which I take to be law, which is, that the king must disclose his title specially in this writ; and therefore, upon this I hold it the proper place to tell you what writs I think are insufficient. First point.

First, If the writ be not[1] *ad idem*, that is, doth not sufficiently denominate the record that should be stayed, then there is no certainty, and so it cannot bind; as if the assise being of the fee only, the writ hath recited it to be of the office.

Secondly, I do confess, that among all the precedents of this writ which I have seen (which are very many), I never found any of a general writ, but that the king's title was ever expressed by way of recital; no writ of *certis de causis vobis mandamus quòd nullatenus procedatis;* no writ *pro eò quòd nos cogitamus quòd in prejudicium nostrum caderet, vobis mandamus, &c.;* but the subject is fairly dealt withal, and the king's title is ever disclosed; not because the court shall judge of the title, as I will tell you by and by, but because the party may be apprised how he may make his suit to the king; for it were a hard matter to say, "Sue to the king," and that the subject should not know upon what ground to sue: that were to leave him in a wood, and not in a way.

Thirdly, if the king's title be referred to a record, and the record destroyed it, then the court is not tied by the writ, as appears in Bedingfield's case, 18 Eliz.[2], in a by-point; where the king's title was grounded upon an office recited in the writ, and the office extended not to divers lands comprised in the writ, there the original record, which the writ voucheth, governeth the writ itself, and destroyeth it for so much as is not contained in the office.

And lastly, I will not deny neither, but that if all the king's

[1] I have added this negative. [2] Co. Rep. 9.

titles be admitted both in law and fact, and all the words of the writ received for true, and yet the king appears to be at no loss, that in that case the court is not bound to stay; as in the case that I put to you in the third part of my division, if the writ should be grounded upon an outlawry in a personal action, or seizure for dilapidations, or the like.

Second point. For the second point, that it needeth not that the king's title laid in the writ should be grounded upon any precedent record, as an inquisition, fine, or the like, but it is enough to recite letters patents of grants subsequent to the king's title, without going higher[1]; I think no man who is learned will deny it.

Put the case, the king is seised in *jure coronæ ab antiquo* of the honour of Windsor; will any man say, that if the king grant letters patents unto *J. S.* of part of the demesnes thereof, and an assise be brought against him, and there comes unto the justices a writ reciting, that whereas the king was seised in right of his crown of the manor of Windsor, in his demesne as of fee, and by his letters patents granted to *J. S.* such a close, part of the demesnes thereof; and whereas nevertheless the said *J. S.* is drawn into plea by assise before you, *ideo vobis mandamus quòd nobis inconsultis, &c.* — will any man, I say, deny but this is a good writ, without vouching any original record of the king's title to the honour of Windsor?

In like manner, if the king shall recite in this writ his title by prescription to grant the office of *custos brevium* in the common pleas, or the like, is not this a sufficient shewing of a title? *À multo fortiori* in our case, where the letters patents are not extracted out of any actual possession precedent in the king, or out of any special prescription, but out of the fountain of his prerogative, and the potential part of his crown, which is *sine patre*, so as you must have this form of writ or none,—for there can be no record precedent, nor any prescription, of that which is merely created; and therefore, the difference that hath been spoken of between the old office and the new is idle, for the writ must be as the case is: if it be an ancient office, you must allege prescription; if a new, you must allege the power, as we have done. Now to say that the king cannot grant or erect any office *de novo*, no man, I think, will be such a plebeian (I mean both in science and honour) as so to affirm;

[1] I have omitted the word "and."

I will cite no books for it; you have the book of time, which is the best book, and perpetual practice.

If the king will erect a county palatine (which is a little model of a monarchy subordinate), what a number of offices are incident to the same, and yet all *de novo*.

If the king should conceive Cornwall to be too far off to fetch their law from Westminster, and therefore would erect a king's bench and common pleas there, and create likewise clerks and prothonotaries, and assign them the same fee, or half the fee that is received at Westminster, all these are offices *de novo*.

And in any[1] of these cases, if any such officers be disturbed (I mean of so many as the king hath ordained to be in his own gift), the defendant may have aid of the king, or the plea of *rege inconsulto*, or this writ; and yet in none of these cases can the king's title be founded upon record or prescription, because the office is new created. Neither is this the case of new offices alone, but the like reason is of patents of privileges for new inventions, and upon patents of fairs, markets, leets, liberties, and the like; upon all which there may be, and are, reserved valuable rents. In all which cases, if they are drawn in question, you shall have aid, or this writ; and yet in none of them you can allege either possession in the Crown, or precedent record or prescription; because they were never *in esse* before the king's grant, but issue out of the potential power of the Crown, being put in act and executed by grant subsequent.

And for the leet, you have the very case in 24 Eliz. fo. 6. where an action of the case was brought by the lord of the leet against *J. S.* for interrupting him to take a mark in money, which appertained to him by reason of an amerciament in his leet. The defendant pleaded a grant by letters patents from the king, with reservation of five pounds, to be paid into the exchequer; judgment, *whether the king not consulted with, &c.* This is our very case; there it was between an ancient leet and a leet newly created; and adjudged there that the suit should stay, and that it should be tried by suit with the king.

Third point.

For the third point, that the certificate of the writ is peremptory, and the court is concluded to believe it, the difference is plain to him that can or will understand it, that in the plea *rege inconsulto* it sufficeth not the king's title appear only by

[1] Printed "many."

way of allegation, except the party maintain it by record, or the court be apprised by the examination of the escheators, or commissioners; but otherwise it is upon the writ, the certificate whereof is peremptory. For this the case is in 20 Eliz. fo. 10. where a *scire facias* was brought to execute a fine, and the tenant said, that he held the manor of the lease of the king for life, the reversion to the king; and prayeth in aid, and sheweth forth no letters patents. And the court was not a little in debate, whether this amounted to such a plea as gave the king a reversion by conclusion, whereby he should shew nothing; "but," saith the book, "to stint the strife, there came a writ "out of the chancery testifying the lease; and there was an "end."

To the same purpose, the case is notable in the 22. of the book of Assise, fo. 24. An assise was brought against the Countess of Kent and John Fitz-Edmunds her son: and first, after some exception to the writ about the style of *countess*, the defendant pleaded that her husband held the land in chief of the king, and died, her son within age; whereupon the king seised, and let unto her during nonage; and demanded judgment, *that the king not consulted with, &c.*: "but," saith the book, "she shewed nothing; but, after, there was a writ "brought out of the chancery, reciting the seizure, with a "clause of *rege inconsulto*; and thereupon the court awarded "the plaintiff should sue to the king."

So in the case 11 H. 4. fo. 39. where in dower of Kent, the tenant pleaded the seizure, *and if the king not consulted with, &c.*; "but the court gave no heed to it" (saith the book), "till "the baron of the exchequer came, and brought in the seisure "in his hands, and thereupon the court awarded a suit to the "king;" but for the escheator, he must give oath of the seisure, and the counsel must shew this warrant; so as to the plea there must be a verification, but the king's writ must be believed.

And to conclude this point, I will put the famous case of *Arden* and *Darcy* unto this special point[1]: An action of waste was brought by *Arden* against *Darcy*, and *Darcy* pleaded the attainder of *Arden*, and the Queen's grant, reserving rent; *Arden* repleaded that there came to the king, by the attainder

[1] This was the case Bacon had relied upon as a precedent for allowing the writ without argument.

of his father, only an estate for life; *Darcy*, after special verdict and argument, obtained the writ of the *rege inconsulto*; whereupon Arden's counsel spake, and alleged that the Queen could be at no loss, for that if the tenant for life granted his estate, rendering rent, and[1] the lessor recovered the waste, he should hold charged: but the judges said, "The Queen hath cer- "tified us by her writ, which is matter of record, that she shall "be at loss if this action proceed; which we ought to credit;" and so gave the rule, that Arden should sue to the Queen if he would.

For the fourth point, that the title of the king, — which is in our case, "Whether the king may erect the writing of the "*supersedeas* into a new office? or whether Brownlow have "right to it as belonging to his office of prothonotary?" — cannot be handled upon allowance of the writ, is without all colour or shadow. Fourth point

For, first, it is *ex diametro* contrary to the intent of the writ; for the intent of the writ is, that this question shall be tried in a suit in chancery with the king; and now, under pretence of arguing the writ, you will enter into the title; this is to enter by the window, and not by the door; and that this may not be, there are infinite authorities.

As, first, you may see in 22 Assise, pl. 24. the Countess of Kent's case (mentioned before), where this writ was brought, reciting, that the king's tenant had died seised upon a gift in tail from the king, and that there the king had seized for wardship. Saith Pole, that was serjeant for the plaintiff, "Since the king's charter of gift of entail, the plaintiff hath "recovered by judgment against the tenant in tail;" and so prayed the assise. Saith Hill, justice, "That shall serve "you for[2] title, when the king hath sent us his pleasure; "therefore sue to the king."

So in 24 Ed. 3. *Brooke, Aid del Roy*, pl. 52. in a writ of entry against an infant, the tenant saith, that his ancestor had certain lands held of the Bishop of Durham by knight's service, whose temporalties are in the king's hands; and shewed letters patents of the wardship, and prayed his aid. Saith Wilby, "He should "have demanded judgment, *if the king not consulted with, &c.*"; then the demandant would have pleaded, that the lands were

[1] I have inserted this word.
[2] I have corrected the text, following Fitz. *Aid del Roy*, pl. 90.

held in socage in gavelkind, and not in knight's service; and further would have pleaded, that they were not comprised in the patent; but the court rejected the plea, because it went to the title.

So 33 H. 6. fo. 2. Danby gives it for a rule, that whensoever a man hath a patent of the king of certain lands, and assise is brought against him of other lands, and he prays in aid, *nient comprise* is no counter-plea to the aid; and yet it seemeth that the patent by this is confessed and avoided; and that it is not *ad idem*, but should be discussed in the other court. The same is affirmed by Fitzherbert clearly; for so are the words, "that "upon the plea of *rege inconsulto*, grounded upon letters "patents, *nient comprise* is no plea." 27 H. 8. fo. 28.

So in 37 H. 6. fo. 32. the rule is given, that if in an assise the defendant plead, that such a one let unto him the manor of *S.* for life, the remainder to the king, and the plaintiff will say that he that let the land had nothing in the land; or, that the king took nothing by that lease; that shall not be tried in the first court, but in the chancery.

So in 7 H. 4. fo. 7. debt was brought upon a bargain and sale of goods, and the defendant said, that he bought the goods to the use of the king, and prayed in aid; and the plaintiff would have counter-pleaded, that they were bought to his own use, and not to the king's; but the court ousted him of that plea, for that shall be tried in the chancery.

In 38 Eliz. fo. 14. there the order of pleading and trial in the chancery is delineated and described in this manner: — When the plea comes into the chancery, first the point shall be tried, whether the king be interested or no; which the books call sometimes the cause, and sometimes the warrant; and then you shall proceed to the title, and so to issue or demurrer; and if to issue, a *procedendo ad capiendam inquisitionem tantùm, &c.;* and if upon explaining the matter in the chancery (as the books call it), it fall out against the king, a *procedendo* shall be awarded in the nature of a command; and if it fall out for the king, there shall be a *supersedeas omnino*, and the court shall say to the parties, *allez à Dieu.*

Nay, further, the book of 8 H. 7. fo. 11. sheweth the learning notably, that if the plea be once in the chancery, although it be upon insufficient cause, the title shall be examined there for the king, and it is no error; so much regard the court had

to the shadow only of the king's title, and the dignity of the court of chancery.

Therefore I conclude, that if in our case Mr. Brownlow will say, that the king nothing had in the office or fee to grant, and so the writ maketh no title for him; Mr. Brownlow knocketh at the wrong door, for *that* he shall allege in chancery.

For the objections: First, it is a mere cavillation, that because we have declared of *a new office*, and *an old fee*, that upon this the court is bound to take notice that the king hath no title. Last point.

For, first, this goeth to the title, and therefore cannot now be questioned, as I have proved before.

And, second, who knows not, that by *the same fees* are intended *the like fees;* which is the same in predicament, *viz.* in quantity; whereof I might put you infinite trivial cases that every mootman knoweth, that *idem redditus* shall be *similis redditus*, and why not *eadem feoda* be *similia feoda:* but I suppose that Mr. Attorney that then was, thought this the fittest and most honourable form of penning the patent, because it doth point out and demonstrate that the king raiseth no new charge upon the subject; and besides, most of the precedents of the patents which I recited before, are penned in the same manner.

As for the second objection, which is more of clamour than of argument, and rather to be chastised than confuted, "that "by this means all suits may be stayed upon a supposed right "of the king's;" this is, I hope, at an end. You see that this writ is no delay, but a bringing of the plea to the proper court. And the very same may be said of the praying aid, for affirming the reversion of the king, without any thing shewing; which may be done in all assises of lands and tenements, in respect of the king's reversion gained by conclusion.

The like may be said likewise of all writs of *rege inconsulto* certifying of the king's seizures; which are peremptory, that[1] they should not be tried; and the king may recite what he will, for it cannot be counter-pleaded.

As for that point which Mr. Solicitor did admit, I shall differ from him; I think he went too far. Saith Mr. Solicitor, The judges may *ex scrinio pectoris*[2] take notice of the right of an office in their own court, and of the law thereupon; so that

[1] Printed "though."

[2] Printed "prætoris."

if any thing contrary to that be recited in the king's writ, they are not to be bound thereby; but I say the law is otherwise, for it is but reputation of right, and not certainty of right, that the court may concede upon usage and their private knowledge; for the court knoweth not what records or other proof may be shewed on the king's part. I pray let the king have that measure against the subject, that the subject hath against the king; and you shall find the subject's right shall not be prejudiced upon a private notice of the court, that it is not judicial. And for that take 25 E. 3. Fitzh. *Aid del Roy*[1], where in a *præcipe* the defendant made default, and it was alleged, nay it appeareth upon evidence, saith the book, that the reversion was in the king; and, saith the book further, the court would take no heed of it, but saith, it behoveth to bring a writ in the nature of a *receit*, and then we must give credit to it. And yet if this conceit pleaseth any man, it is not our case; for this might have been alleged if the assise had been brought in the common pleas, for Brownlow is an officer there and not here.

And lastly, if there should be some incongruity in the writ, as I know it was formed of as good counsel (not speaking of myself, but of the rest) as is in England, or hath been; but if, I say, Mr. Brownlow will read us a lecture, he is never the nearer, for we can have a new writ if we will: it is not like *double aid*, if there should be fault in this writ. But sure I am that the matter is infallible; that whether this office and fee be lawfully created and confirmed by the King by his letters patents to Michell, or whether it be in disturbance of the freehold of Mr. Brownlow, this must be discussed *penes ipsum regem*; and if I were to advise again, I would not alter one word of this writ.

Now, as for the command of this writ,—by myself, long since, when I first opened this case in this court, truly distributed into four kinds:

A minatory commandment;

A conditional commandment;

A peremptory commandment, temporary;

And a peremptory commandment, absolute and peremptory.

The first kind is the *circumspectè agatis*, where the writ purporteth an admonition to the court to be circumspect in their

[1] Apparently a wrong reference.

proceedings, that they do nothing in prejudice of the king, without any other commandment of stay.

The second is, the *si vobis constare poterit*, where the writ doth lay it upon any special point, the truth thereof to be examined being left to the court, so as the commandment is conditional.

The third is, where the writ is peremptory, but yet is for a time, and is *donec aliud habueritis in mandatis*, or *nobis inconsultis non procedatis*, which implies as much; and of this kind is our writ.

And the fourth is *supersedeas omnino*, with an *allez à Dieu* to the plaintiff; which final writ is never but after the discussing of the plea in the chancery.

For the court's obedience, which is the relative to the mandate of the king, I said in the beginning, that the judges have ever been the principal examples of obedience to the king; and I will note unto the court four points, which I find in their predecessors concerning this writ.

First, their wisdom and circumspection; for I may truly observe, that when this writ was brought, they have ever done less than their warrant.

So you see in the case 21 E. 3. where the writ was but a *circumspectè agatis*, yet when the plaintiff's counsel urged they might at least take the verdict, yet the court stayed presently.

So likewise in divers cases, where the writ was conditional, *si vobis constare poterit;* yet the court had no mind to meddle in it after that writ brought, nor to examine that point, which seemed to be left to them at large.

So as still their obedience was more absolute than the commandment; and the court hath ever esteemed this writ as a thing sacred: for as it was the right of the Romans, that where a man's wall joined to a temple, if the owner had occasion to pull down his house, he left some of his own wall, lest he should touch the sacred wall; so the court would never venture upon the utmost bound of this writ, lest they should touch upon violation of the king's command.

Secondly, I note the reference which the judges used in 2 R. 3. in Hunston's case, where, after the writ was brought by the king's attorney, the judges would not suffer any public argument, but assembled in a private manner, the door shut, and upon conference agreed to obey the writ, for they thought

it a thing of no good example to dispute the king's commandment; as if they were like the soldiers which Tacitus speaketh of, *erant in officio, sed tamen quasi mallent imperantis mandata interpretari quàm exequi.*

Thirdly, I note the great humility of the judges in the phrase of the court upon this writ, where still they say, their hands are closed; as if they were turned statues or images, and that they had no power or motion.

[Hro. Ald del Roy. 69.] Lastly, I may note the danger of your predecessors in 1° of the book of Assise, where, although this writ was not brought, yet because the court did not of themselves *ex officio* regard sufficiently the king's title, it was said, the justice was suspended from his office, and was *in moult graund danger.*

To conclude, I will reduplicate that which I said in the beginning, that this writ did ever stay the suit when it came, except only in two cases.

The one in a direct case of an act of parliament to the contrary, *quòd non supersedeant,* as in *Bedingfield's* case, 28 Eliz.

And the other is where in respect of a mischief, the court did proceed only *de bene esse,* lest that a *procedendo* should after come, and come too late.

The case was[1], that an action of deceit was brought, and before the summoners were examined this writ came; whereupon, after Danby had said that their hands were closed, Prisot very worthily untied the knot; saying, "The mischief "is great in this case, for, if the summoners should die before "examination, the plaintiff hath lost his action and his land for "ever, although a *procedendo* should come after;" and compared it to the case of the writ of error for infancy, where perhaps the infant was near his full age: if the writ should be brought of the *rege inconsulto,* and then the full age should run on before inspection, the writ of error was gone and lost, and the fine good for ever. "This therefore will we do," saith he: "examine the summoner *de bene esse,* but with protestation "withal, that we expect a *procedendo* to come." This was good justice, and yet true obedience; but in no other case shall you ever find that the writ was disobeyed.

Therefore I will end with this to your lordship and the rest, that *obedience is better than sacrifice;* that[2] is a voluntary thing,

[1] 35 H. 6.

[2] Printed "it"; the two words are easily confounded in abbreviations. The reference is obviously to sacrifice.

and it is many times a glory or fame; but obedience is ever acceptable.

I know the prothonotaries are servants of the court; but I know the court will more remember whom *they* serve, than who serves *them;* and therefore I pray, as the king commands, that the proceedings in this assise be stayed, and that the plaintiff be ordered to sue to the king, if he will.[1]

[1] Brook, Patents, 12; 13 H. 4. 14; 11 H. 4. 86.

PREPARATION FOR THE UNION OF LAWS.

PREFACE.

THIS paper, the object of which needs no explanation, has heretofore been printed with some additions, an account of which will be given further on. It stands here as it is to be found in Harl. MSS. 6797; the body of it, after the introductory matter, being written wide and on the alternate pages:— obviously to admit corrections and additions, and in order that the corresponding Scotch law might be entered opposite. If any authentication of it, as having passed through Bacon's hands, were wanting beyond the introduction, it is to be found in a few corrections, one of which Mr. Spedding informs me is certainly in Bacon's hand, and others may very well be so.

I should not have thought more than the introduction now worth printing (and that in the next Division of the Works) had it not already appeared: and I may say the same of the whole of the paper that next follows.

PREPARATION

TOWARD

THE UNION OF LAWS.

YOUR Majesty's desire of proceeding towards the union of this whole island of Great Britain under one law, is (as far as I am capable to make any opinion of so great a cause) very agreeable to policy and justice. To policy, because it is one of the best assurances (as human events can be assured) that there will be never any relapse in any future ages to a separation. To justice, because *dulcis tractus pari jugo:* it is reasonable that communication of privilege draw on communication of discipline and rule. This work being of greatness and difficulty, needeth not to embrace any greater compass of designment, than is necessary to your Majesty's main end and intention. I consider therefore, that it is a true and received division of law into *jus publicum* and *privatum,* the one being the sinews of property, and the other of government. For that which concerneth private interest of *meum* and *tuum,* in my simple opinion, it is not at this time to be meddled with: men love to hold their own as they have held, and the difference of this law carrieth no mark of separation. For we see in any one kingdom, which is most at unity in itself, there is diversity of customs for the guiding of property and private rights: *in veste varietas sit, scissura non sit.* All the labour is to be spent in the other part; though perhaps not in all the other part: for it may be your Majesty, in your high wisdom, will discern that even in that part there will not be requisite a conformity in all points. And although such conformity were to be wished, yet perchance it will be scarcely possible in many points to pass them for the present by assent of Parliament. But be-

cause we, that serve your Majesty in the service of our skill and profession, cannot judge what your Majesty, upon reason of state, will leave and take; therefore 'tis fit for us to give, as near as we can, a general information. Wherein I, for my part, think good to hold myself to one of the parallels, I mean that of the English laws. For although I have read, and read with delight, the Scottish statutes, and some other collection of their laws; with delight I say, partly to see their brevity and propriety of speech, and partly to see them come so near to our laws; yet I am unwilling to put my sickle in another's harvest, but to leave it to the lawyers of the Scottish nation; the rather, because I imagine with myself that if a Scottish lawyer should undertake, reading of the English statutes, or other our books of law, to set down positively in articles what the law of England were, he might oftentimes err: and the like errors, I make account, I might incur in theirs. And therefore, as I take it, the right way is, that the lawyers of either nation do set down in brief articles what the law is of their nation, and then after, a book of two columns, either having the two laws placed respectively, to be offered to your Majesty, that your Majesty may by a ready view see the diversities, and so judge of the reduction, or leaving it as it is.

Jus publicum I will divide, as I hold it fittest for the present purpose, into four parts. The first, concerning criminal causes, which with us are truly accounted *publici juris*, because both the prejudice and the prosecution principally pertain to the Crown and public estate. The second, concerning the causes of the Church. The third, concerning magistrates, officers, and Courts; wherein falleth the consideration of your Majesty's regal prerogative, whereof the rest are but streams. And the fourth, concerning certain special politic laws, usages, and constitutions, that do import the public peace, strength, and wealth of the kingdom. In which part I do comprehend not only constant ordinances of law, but likewise forms of administration of law, such as are the commissions of the peace, the visitations of the provinces by the judges of the circuits, and the like. For these in my opinion, for the purpose now in hand, deserve a special observation, because they being matters of that temporary nature as they may be altered, as I suppose, in either kingdom, without Parliament, as to your Majesty's wisdom may seem best, it may be the most profitable and ready

part of this labour will consist in the introducing of some uniformity in them.

To begin therefore with capital crimes, and first that of TREASON.

Cases of treason.

Where a man doth compass or imagine the death of the king, if it appear by any overt act, it is treason.

Where a man doth compass or imagine the death of the king's wife, if it appear by over act, it is treason.

Where a man doth compass or imagine the death of the king's eldest son and heir, if it appear by any overt act, it is treason.

Where a man doth violate the king's wife, it is treason.

Where a man doth violate the king's eldest daughter unmarried, it is treason.

Where a man doth violate the wife of the king's eldest son and heir, it is treason.

Where a man doth levy war against the king, in his realm, it is treason.

Where a man is adherent to the king's enemies, giving them aid and comfort, it is treason.

Where a man counterfeiteth the king's great seal, it is treason.

Where a man counterfeiteth the king's privy seal, it is treason.

Where a man counterfeiteth the king's privy signet, it is treason.

Where a man doth counterfeit the king's sign manual, it is treason.

Where a man counterfeits the king's money, it is treason.

Where a man bringeth into the realm false money, counterfeited to the likeness of the coin of England, with intent to merchandise or make payment therewith, and knowing it to be false, it is treason.

Where a man counterfeiteth any foreign coin current in payment within this realm, it is treason.

Where a man doth bring in foreign money, being current within the realm, the same being false and counterfeit, with intent to utter it, and knowing the same to be false, it is treason.

Where a man doth clip, wash, round, or file any of the

king's money, or any foreign coin current by proclamation, for gain's sake, it is treason.

Where a man doth any ways impair, diminish, falsify, scale, or lighten the king's moneys, or any foreign moneys current by proclamation, it is treason.

Where a man killeth the chancellor, being in his place and doing his office, it is treason.

Where a man killeth the treasurer, being in his place and doing his office, it is treason.

Where a man killeth the king's justice in eyre, being in his place and doing his office, it is treason.

Where a man killeth the king's justice of assize, being in his place and doing his office, it is treason.

Where a man killeth the king's justice of *Oyer* and *Terminer*, being in his place and doing his office, it is treason.

Where a man doth persuade or withdraw any of the king's subjects from his obedience, or from the religion by his majesty established, with intent to withdraw him from the king's obedience, it is treason.

Where a man is absolved, reconciled, or withdrawn from his obedience to the king, or promiseth his obedience to any foreign power, it is treason.

Where any Jesuit, or any other priest, ordained since the first year of the reign of queen Elizabeth, shall come into, or remain in any part of this realm, it is treason.

Where any person being brought up in a college of Jesuits, or seminary, shall not return within six months after proclamation made, and within two days after his return submit himself to take the oath of supremacy, if otherwise he do return, or be within the realm, it is treason.

Where a man doth affirm or maintain any foreign authority of jurisdiction spiritual, or doth put in ure or execute any thing for the advancement or setting forth thereof, such offence, the third time committed, is treason.

Where a man refuseth to take the oath of supremacy, being tendered by the bishop of the diocese if he be an ecclesiastical person; or by commission out of the chancery if he be a temporal person; such offence the second time is treason.

Where a man committed for treason doth voluntarily break prison, it is treason.

Where a jailor doth voluntarily permit a man committed for treason to escape, it is treason.

Where a man procureth or consenteth to a treason, it is treason.

Where a man relieveth or comforteth a traitor, knowing it, it is treason.

The punishment, trial, and proceedings in cases of treason.

In treason, the corporal punishment is by drawing on hurdle from the place of the prison to the place of execution, and by hanging and being cut down alive, bowelling, and quartering: and in women by burning.

In treason, there ensueth a corruption of blood in the line ascending and descending.

In treason, lands and goods are forfeited, and inheritances, as well intailed as fee-simple, and the profits of states for life.

In treason, the escheats go to the king, and not to the lord of the fee.

In treason, the lands forfeited shall be in the king's actual possession without office.

In treason there be no accessaries, but all are principals.

In treason, no benefit of clergy, or sanctuary, or peremptory challenge.[1]

In treason, if the party stand mute[2], yet nevertheless judgment and attainder shall proceed all one as upon verdict.

In treason, bail is not permitted.

In treason, no counsel is to be allowed to the party.

In treason, no witness shall be received upon oath for the party's justification.

In treason, if the fact be committed beyond the seas, yet it may be tried in any county where the king will award his commission.

In treason, if the party be *non sanæ memoriæ*, yet if he had formerly confessed it before the king's council, and that it be certified that he was of good memory at the time of his examination and confession, the court may proceed to judgment without calling or arraigning the party.

In treason, the death of the party before conviction dischargeth all proceedings and forfeitures.

[1] These last three words are added in Bacon's own hand.

[2] In the first draft there followed, "or challenge peremptorily above the number that the law allows," which are struck out.

In treason, if the party be once acquit, he shall not be brought in question again for the same fact.

In treason, no new case not expressed in the statute of 25 Ed. III. nor made treason by any special statute since, ought to be judged treason, without consulting with the parliament.

In treason, there can be no prosecution but at the king's suit, and the king's pardon dischargeth.

In treason, the king cannot grant over to any subject power and authority to pardon it.

In treason, a trial of a peer of the kingdom is to be by special commission before the lord high steward, and those that pass upon him to be none but peers; and the proceeding is with great solemnity, the lord steward sitting under a cloth of estate with a white rod of justice in his hand; and the peers may confer together, but are not any ways shut up, and are demanded by the lord steward their voices one by one, and the plurality of voices carrieth it.

In treason, it hath been an ancient usage and favour from the kings of this realm to pardon the execution of hanging, drawing, and quartering; and to make warrant for their beheading.

The proceeding in case of treason with a common subject is in the king's bench, or by commission of *Oyer* and *Terminer*.

MISPRISION OF TREASON.

Cases of misprision of treason.

Where a man concealeth high treason only, without any comforting or abetting, it is misprision of treason.

Where a man counterfeiteth any foreign coin of gold or silver not current in the realm, it is misprision of treason.

The punishment, trial, and proceeding in cases of misprision of treason.

The punishment of misprision of treason is by perpetual imprisonment, loss of the issues of their lands during life, and loss of goods and chattels.

The proceeding and trial is, as in cases of treason.

In misprision of treason bail is not admitted.

PETIT TREASON.

Cases of petit treason.

Where the servant killeth the master, it is petit treason.

Where the wife killeth her husband, it is petit treason.

Where a spiritual man killeth his prelate, to whom he is subordinate and oweth faith and obedience, it is petit treason.

Where the son killeth the father or mother, it hath been questioned whether it be petit treason, and the late experience and opinion seemeth to weigh to the contrary, though against law and reason in my judgment.[1]

The punishment, trial, and proceeding in cases of petit treason.

In petit treason, the corporal punishment is by drawing on a hurdle, and hanging.

In petit treason, the forfeiture is the same with the case of felony.

In petit treason, all accessories are but in case of felony.

FELONY.

Cases of felony.

Where a man committeth murder, that is, homicide of prepensed malice, it is felony.

Where a man committeth manslaughter, that is, homicide of sudden heat and not of malice prepensed, it is felony.

Where a man committeth burglary, that is breaking of an house with an intent to commit felony, it is felony.

Where a man rideth armed, with a felonious intent, it is felony.

Where a man doth maliciously and feloniously burn a house, it is felony.

Where a man doth maliciously and feloniously burn corn upon the ground, or in stacks, it is felony.

Where a man doth maliciously cut out another's tongue, or put out his eyes, it is felony.

Where a man robbeth or stealeth, that is, taketh away another

[1] See *ante*, pp. 357, 634.

man's goods, above the value of twelve-pence, out of his possession, with an intent to conceal it, it is felony.

Where a man embezzleth or withdraweth any of the king's records at Westminster, whereby any judgment is reversed, it is felony.

Where a man that hath custody of the king's armour, munition, or other habiliments of war, doth maliciously convey away the same, to the value of twenty shillings, it is felony.

Where a servant hath goods of his master's delivered unto him, and goeth away with them, it is felony.

Where a man conjures or invocates wicked spirits, it is felony.

Where a man doth use or practise any manner of witchcraft, whereby any person shall be killed, wasted, or lamed in his body, it is felony.

Where a man practiseth any witchcraft, to discover treasure hid, or to discover stolen goods, or to provoke unlawful love, or to impair or hurt any man's cattle or goods, the second time, having been once before convicted of like offence, it is felony.

Where a man useth the craft of multiplication of gold or silver, it is felony.

Where a man committeth rape, it is felony.

Where a man taketh away a woman against her will, not claiming her as his ward or bondwoman, it is felony.

Where any person marrieth again, her or his former husband or wife being alive, it is felony.

Where a man committeth buggery with man or beast, it is felony.

Where any persons, above the number of twelve, shall assemble themselves with intent to put down enclosures, or bring down the prices of victuals, &c. and do not depart after proclamation, it is felony.

Where man shall use any words to encourage or draw any people together, *ut supra*, and they do assemble accordingly, and do not depart after proclamation, it is felony.

Where a man being the king's sworn servant conspireth to murder any lord of the realm or any of the privy council, it is felony.

Where a soldier hath taken any parcel of the king's wages, and departeth without licence, it is felony.

Where a man receiveth a seminary priest, knowing him to be such a priest, it is felony.

Where a recusant, which is a seducer and persuader and inciter of the king's subjects against the king's authority in ecclesiastical causes, or a persuader of conventicles, &c. shall refuse to abjure the realm, it is felony.

Where vagabonds be found in the realm, calling themselves *Egyptians*, it is felony.

Where a purveyor taketh without warrant, or otherwise doth offend against certain special laws, it is felony.

Where a man hunteth in any forest, park, or warren, by night or by day, with vizards or other disguisements, and is examined thereof, and concealeth his fact, it is felony.

Where a man stealeth certain kinds of hawks, it is felony.

Where a man committeth forgery the second time, having been once before convicted, it is felony.

Where a man transporteth rams or other sheep out of the king's dominions, the second time, it is felony.

Where a man being imprisoned for felony breaks prison, it is felony.

Where a man procureth or consenteth to a felony to be committed, it is felony, as to make him accessary before the fact.

Where a man receiveth or relieveth a felon, knowing thereof, it is felony, as to make him accessary after the fact.

Where a woman, by the constraint of her husband, in his presence, joineth with him in committing of felony, it is not felony, neither as principal nor as accessary.

The punishment, trial, and proceeding in cases of felony.

In felony, the corporal punishment is by hanging, and it is doubtful whether the king may turn it into beheading in the case of a peer or other person of dignity; because in treason the striking off the head is part of the judgment, and so the king pardoneth the rest, but in felony it is no part of the judgment, and the king cannot alter the execution of law: yet precedents have been both ways.

In felony, there followeth corruption of blood, except it be in cases made felony by special statutes with a proviso that there shall be no corruption of blood.

In felony, lands in fee-simple and goods are forfeited, but not lands intailed, and the profits of states for life are likewise for-

feited: And by some customs lands in fee-simple are not forfeited;

Father to the bough, son to the plough.

In felony, the escheats go to the lord of the fee, and not to the king, except he be lord: But the profits of states for lives, or in tail during the life of tenant in tail, go to the king; and the king hath likewise, in fee-simple lands holden of common lords, *annum, diem, et vastum.*

In felony, the lands are not in the king before office, nor in the lord before entry or recovery in writ of escheat, or death of the party attained.

In felony, there can be no proceeding with the accessary before there be a proceeding with the principal; which principal if he die, or plead his pardon, or have his clergy before attainder, the accessaries can never be dealt with.

In felony, if the party stand mute, and will not put himself upon his trial, or challenge peremptorily above the number that the law allows, he shall have judgment not of hanging, but of penance of pressing to death; but then he saves his lands, and forfeits only his goods.

In felony, at the common law, the benefit of clergy or sanctuary was allowed; but now by statutes it is taken away in most cases.

In felony, bail may be admitted, where the fact is not notorious and the person not of evil fame.

In felony, no counsel is to be allowed to the party, no more than in treason.

In felony, no witness shall be received upon oath for the party's justification, no more than in treason.

In felony, if the fact be committed beyond the seas, or upon the seas, *super altum mare*, there is no trial at all in the one case, nor by course of jury in the other case, but by the jurisdiction of the Admiralty.

In felony, if the party be *non sanæ memoriæ*, although it be after the fact, he cannot be tried nor adjudged, except it be in course of outlawry, and that is also erroneous.

In felony, the death of the party before conviction dischargeth all proceedings and forfeitures.

In felony, if the party be once acquit, or in peril of judgment of life lawfully, he shall never be brought in question again for the same fact.

In felony, the prosecution may be either at the king's suit by way of indictment, or at the party's suit by way of appeal, and if it be by way of appeal, the defendant shall have his counsel, and produce witnesses upon oath, as in civil causes.

In felony, the king may grant *hault justice* to a subject, with the regality of power to pardon it.

In felony, the trial of peers is all one as in case of treason.

In felony, the proceedings are in the king's bench, or before commissioners of *Oyer* and *Terminer*, or of gaol delivery, and in some cases before justices of peace.

Case of Felonia de se, *with the punishment, trial, and proceeding therein.*

In the civil law, and other laws, they make a difference of cases of *felonia de se:* for where a man is called in question upon any capital crime, and killeth himself to prevent the law, they give the same judgment in all points of forfeiture, as if they had been attainted in their life-time: and on the other side, where a man killeth himself upon impatience of sickness or the like, they do not punish it at all. But the law of England taketh it all in one degree, and punisheth it only with loss of goods to be forfeited to the king, who generally granteth them to his *Almoner*, where they be not formerly granted unto special liberties.

OFFENCES OF PRÆMUNIRE.

Cases of Præmunire.

Where a man purchaseth or accepteth any provision, that is, collation of any spiritual benefice or living, from the see of Rome, it is case of præmunire.

Where a man will purchase any process to draw any people of the king's allegiance out of the realm, in plea whereof the cognizance pertains to the king's court, and cometh not in person to answer his contempt in that behalf before the king and his council, or in his chancery, it is case of præmunire.

Where a man doth sue in any court which is not the king's court, to defeat or impeach any judgment given in the king's court, and doth not appear to answer his contempt, it is case of præmunire.

Where a man doth purchase or pursue in the court of Rome,

or elsewhere, any process, sentence of excommunication, bull, instrument, or other thing which toucheth the king in his regality, or his realm in prejudice, it is case of præmunire.

Where a man doth affirm or maintain any foreign authority of jurisdiction spiritual, or doth put in ure or execute any thing for the advancement or setting forth thereof; such offence, the second time committed, is case of præmunire.

Where a man refuseth to take the oath of supremacy, being tendered by the bishop of the diocese, if he be an ecclesiastical person; or by commission out of the chancery, if he be a temporal person; it is case of præmunire.

Where the dean and chapter of any church, upon the *Congé d'élire* of an archbishop or bishop, doth refuse to elect any such archbishop or bishop as is nominated unto them in the king's letter missive, it is case of præmunire.

Where a man doth contribute or give relief unto any Jesuit or seminary priest, or to any college of Jesuits or seminary priests, or to any person brought up therein, and called home, and not returning, it is case of præmunire.

Where a man is broker of an usurious contract above ten in the hundred, it is case of præmunire.

The punishment, trial, and proceeding in cases of præmunire.

The punishment is by imprisonment during life, forfeiture of goods, forfeiture of lands in fee-simple, and forfeiture of the profits of lands intailed, or for life.

The trial and proceeding is as in cases of misprision of treason; and the trial is by peers, where a peer of the realm is the offender.

OFFENCES OF ABJURATION AND EXILE.

Cases of abjuration and exile, and the proceedings therein.

Where a man committeth any felony, for the which at this day he may have privilege of sanctuary, and taketh sanctuary, and confesseth the felony before the coroner, he shall abjure the liberty of the realm, and choose his sanctuary; and if he commit any new offence, or leave his sanctuary, he shall lose the privilege thereof, and suffer as if he had not taken sanctuary.

Where a man not coming to the church, and not being a

popish recusant, doth persuade any of the king's subjects to impugn his Majesty's authority in causes ecclesiastical, or shall persuade any subject from coming to the church or receiving the communion, or persuade any subject to come to any unlawful conventicles, or shall be present at any such unlawful conventicles, and shall not after conform himself within a time, and make his submission, he shall abjure the realm, and forfeit his goods and his lands during life; and if he depart not within the time prefixed, or return, he shall be in the degree of a felon.

Where a man being a popish recusant, and not having lands to the value of twenty marks per annum, nor goods to the value of 40*l.*, shall not repair to his dwelling or place where he was born, and there confine himself within the compass of five miles, he shall abjure the realm; and if he return, he shall be in the degree of a felon.

Where a man kills the king's deer in chases or forests, and can find no sureties after a year's imprisonment, he shall abjure the realm.

Where a man is a trespasser in parks, or in ponds of fish, and after three years' imprisonment cannot find sureties, he shall abjure the realm.

Where a man is a ravisher of any child within age, whose marriage belongs to any person, and marrieth the said child after years of consent, and is not able to satisfy for the marriage, he shall abjure the realm.

OFFENCE OF HERESY.

Case of heresy, and the trial and proceeding therein.

The declaration of heresy, and likewise the proceeding and judgment upon heretics, is by the common laws of this realm referred to the jurisdiction ecclesiastical, and the secular arm is reached unto them by the common laws (and not by any statute) for the execution of them by the king's writ *de hæretico comburendo.*

ANSWERS TO QUESTIONS

PROPOSED BY

SIR ALEXANDER HAY.

PREFACE.

THIS Paper was printed in 1641 with other matter, as mentioned further on. As it is clearly a separate piece, complete in itself, I have placed it here, following the *Preparation towards the Union of Laws*, with which it is obviously connected in design.

Sir Alexander Hay was Secretary of State for Scotland in 1608, the date assigned to this Paper, at which time the project for the union was on foot. In the copy in the Lansdowne MSS. it is said to have been written at the request of Lord Northampton, who became Lord Privy Seal in that year. It can hardly be doubtful that it was intended to assist in preparing an assimilation of the administration of England and Scotland.

THE ANSWERS TO QUESTIONS

PROPOUNDED BY

SIR ALEXANDER HAY, KNT.

TOUCHING THE OFFICE OF CONSTABLE.

A.D. 1608.

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1. Question. *WHAT is the original of constables?*

Answer. To the first question of the original of constables it may be said, *caput inter nubila condit;* for the authority was granted upon the ancient laws and customs of this kingdom practised long before the Conquest, and intended and executed for conservation of peace, and repression of all manner of disturbance and hurt of the people;—and that as well by way of prevention as punishment: but yet so, as they have no judicial power, to hear and determine any cause, but only a ministerial power, as in the answer to the seventh article is demonstrated.

As for the office of high or head constable, the original of that is yet more obscure; for though the high-constable's authority hath the more ample circuit (he being over the hundred, and the petty-constable over the village), yet I do not find that the petty-constable is subordinate to the high-constable, or to be ordered or commanded by him; and therefore, I doubt, the high-constable was not *ab origine;* but that when the business of the county increased, the authority of justices of peace was enlarged by divers statutes, and then, for conveniency sake, the office of high-constable grew in use for the receiving of the commandments and prescripts from the justices of peace, and distributing them to the petty-constables: and in token of this, the election of high-constable in most parts of the kingdom is by the appointment of the justices of the peace, whereas the election of the petty-constable is by the people.

But there are two things unto which the office of constables hath special reference, and which of necessity, or at least a kind of congruity, must precede the jurisdiction of that office; — either the things themselves, or something that hath a similitude or analogy towards them.

1. The division of the territory, or gross of the shires, into hundreds, villages, and towns; for the high-constable is officer over the hundred, and the petty-constable is over the town or village.

2. The court-leet, unto which the constable is attendant and minister; for there the constables are chosen by the jury, there sworn, and there that part of their office which concerneth information is principally to be performed: for the jury being to present offences and offenders, are chiefly to take light from the constable of all matters of disturbance and nuisance of the people; which they, in respect of their office, are presumed to have best and most particular knowledge of.

The jurisdiction of the court-leet is to three ends.

1. To take the ancient oath of allegiance of all males above twelve years.

2. To inquire of all offences against the peace; and for those that are against the crown and peace both, to inquire of only, and certify to the justices of gaol delivery; but those that are against the peace simply, they are to inquire of and punish.

3. To inquire of, punish, and remove all public nuisances and grievances concerning infection of air, corruption of victuals, case of chaffer and contract, and[1] all other things that may hurt or grieve the people in general, in their health, quiet, and welfare.

And to these three ends, as matters of policy subordinate, the court-leet hath power to call upon the pledges that are to be taken of the good behaviour of the resiants that are not tenants, and to inquire of all defaults of officers, as constables, ale-tasters, and the like: and likewise for the choice of constables, as was said.

The jurisdiction of these leets is either remaining in the king, and in that case exercised by the sheriff in his Turn, which is the grand leet, or granted over to subjects; but yet it is still the king's court.

[1] I have substituted this word for "of."

2. Quest. *Concerning the election of constables?*

Answ. The election of the petty-constable, as was said, is at the court-leet by the inquest that make the presentments; and election of head-constables is by the justices of the peace at their quarter sessions.

3. Quest. *How long is their office?*

Answ. The office of constable is annual, except they be removed.

4. Quest. *Of what rank or order of men are they?*

Answ. They be men, as it is now used, of inferior, yea of base condition, which is a mere abuse or degenerating from the first institution; for the petty-constables in towns ought to be of the better sort of resiants in the same: save that they be not aged or sickly, but of able bodies in respect of keeping watch and toil of their place; nor must they be in any man's livery. The high-constables ought to be of the ablest freeholders, and substantiallest sort of yeomen, next to the degree of gentlemen; but should not be incumbered with any other office, as mayor of a town, under-sheriff, bailiff, etc.

5. Quest. *What allowance have the constables?*

Answ. They have no allowance, but are bound by duty to perform their office *gratis*; which may the rather be endured because it is but annual, and they are not tied to keep or maintain any servants or under-ministers, for that every one of the king's people within their limits are bound to assist them.

6. Quest. *What if they refuse to do their office?*

Answ. Upon complaint made of their refusal to any one justice of peace, the said justice may bind them over to the sessions, where, if they cannot excuse themselves by some allegation that is just, they may be fined and imprisoned for their contempt.

7. Quest. *What is their authority or power?*

Answ. The authority of the constable,—as it is substantive and of itself, or substituted and astricted to the warrants and commands of the justices of the peace,—so again it is original, or additional: for either it was given them by the common law, or else annexed by divers statutes. And as for subordinate power, wherein the constable is only to execute the commands of the justices of peace, and likewise the additional power which is given by divers statutes, it is hard to comprehend them in any brevity; for that they do correspond to the office and

authority of justices of peace, which is very large, and are created by the branches of several statutes: but for the original and substantive power of constables, it may be reduced to three heads; namely,

1. For matter of peace only.
2. Of peace and the crown.
3. For matter of nuisance, disturbance, and disorder, although they be not accompanied with violence and breach of the peace.

First, For pacifying of quarrel begun, the constable may, upon hot words given, or likelihood of breach of the peace to ensue, command them in the King's name to keep peace, and depart, and forbear: and so he may, where an affray is made, part the same, and keep the parties asunder, and arrest and commit the breakers of the peace, if they will not obey; and call power to assist him for that purpose.

For punishment of breach of peace past, the law is very sparing in giving any authority to constables, because they have not power judicial, and the use of his office is rather for preventing or staying of mischief, than for punishment of offences: for in that part he is rather to execute the warrants of the justices; or, when sudden matter ariseth upon his view of notorious circumstances, to apprehend offenders, and to carry them before the justices of peace, and generally to imprison in like cases of necessity, where the case will not endure the present carrying of the party before the justices. And so much for peace.

Secondly, For matters of the crown, the office of the constable consisteth chiefly in these four parts:

1. To arrest.
2. To make hue and cry.
3. To search.
4. To seise goods.

All which the constable may perform of his own authority, without any warrant from the justices of the peace.

1. For, first, if any man will lay murder or felony to another's charge, or do suspect him of murder or felony, he may declare it to the constable, and the constable ought, upon such declaration or complaint, to carry him before a justice of peace; and if by common voice or fame any man be suspected, the constable ought to arrest him, and bring him before a jus-

tice of peace, though there be no other accusation or declaration.

2. If any house be suspected for receiving or harbouring of any felon, the constable, upon complaint or common fame, may search.

3. If any fly upon the felony, the constable ought to raise hue and cry.

4. And the constable ought to seise his goods, and keep them safe without impairing, and inventary them in presence of honest neighbours.

Thirdly, For matters of common nuisance and grievances, they are of very variable nature, according to the several comforts which man's life and society requireth, and the contraries which infest the same.

In all which, be it matter of corrupting air water or victuals, stopping straightening or indangering of passages, or general deceits, in weights, measures, sizes, or counterfeiting wares, and things vendible; the office of constable is to give, as much as in him lies, information of them and of the offenders, in leets, that they may be presented; but because leets are kept but twice in the year, and many of those things require present and speedy remedy, the constable, in things notorious and of vulgar nature, ought to forbid and repress them in the mean time: if not, they are for their contempt to be fined or imprisoned, or both, by the justices in their sessions.

8. Quest. *What is their oath?*

Answ. The manner of the oath they take is as followeth:

"You shall swear that you shall well and truly serve the King, and the lord of this law-day; and you shall cause the peace of our sovereign lord the King well and truly to be kept to your power: and you shall arrest all those that you see committing riots, debates, and affrays in breach of peace: and you shall well and truly endeavour yourself to your best knowledge, that the statute of Winchester for watching, hue and cry, and the statutes made for the punishment of sturdy beggars, vagabonds, rogues, and other idle persons coming within your office be truly executed, and the offenders be punished: and you shall endeavour, upon complaint made, to apprehend barraters and riotous persons making affrays, and likewise to apprehend felons; and if any of them make resistance with force and multitude of misdoers, you shall make outcry and pursue them

till they be taken; and shall look unto such persons as use unlawful games; and you shall have regard unto the maintenance of artillery; and you shall well and truly execute all process and precepts sent unto you from the justices of the peace of the county; and you, shall make good and faithful presentments of all bloodsheds, out-cries, affrays, and rescues made within your office: and you shall well and truly, according to your own power and knowledge, do that which it belongeth to your office of constable to do, for this year to come. So help," etc.

9. Quest. *What difference is there betwixt the high-constables and petty-constables?*

Answ. Their authority is the same in substance, differing only in the extent; the petty-constables serving only for one town, parish, or borough; the head-constable for the whole hundred: nor is the petty-constable subordinate to the head-constable for any commandment that proceeds from his own authority; but it is used, that the precepts of the justices be delivered unto the high-constables, who being few in number, may better attend the justices, and then the head-constables, by virtue thereof, make their precepts over to the petty-constables.

10. Quest. *Whether a constable may appoint a deputy?*

Answ. In case of necessity a constable may appoint a deputy, or in default thereof, the steward of the court leet may: which deputy ought to be sworn before the said steward.

The constable's office[1] consists in three things:

1. Conservation of the peace.
2. Serving precepts and warrants.
3. Attendance for the execution of statutes.

[1] This seems to be part of a tabular view of this and other matters of law, and not properly to belong to the *Answers*. See p. 775.

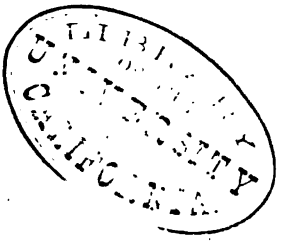
ORDINANCES IN CHANCERY.

PREFACE

THERE is, I believe, no official copy of these Ordinances extant: there are, however, but few and mere verbal discrepancies among the MSS. and editions I have seen.

There are, in print and in manuscript, earlier orders extant; but an attempt to determine how far Bacon altered existing practice, or for the first time fixed it, and how far he only collected rules previously dispersed, is a task for an historian of the Court of Chancery. A comparison of these Ordinances with the Aphorisms in the 8th Book *De Augmentis* will, I think, point out some of them as probably Bacon's own.

In Harl. MSS. 1576 — in which volume are also some Orders of Lord Ellesmere — there are fifteen additional rules, which from the place in which they occur would seem to be Bacon's. As I should not have printed the original Ordinances had they not already been incorporated in the collected Works, so I omit these others. It may, however, be worth mentioning that the first few of them are for regulating or inaugurating a kind of creditors' suit *inter vivos* for enforcing a compulsory composition, where three-fourths of the creditors agree.



ORDINANCES

MADE BY

THE LORD CHANCELLOR BACON,

FOR THE BETTER AND MORE REGULAR ADMINISTRATION OF JUSTICE IN THE CHANCERY.

TO BE DAILY[1] OBSERVED, SAVING THE PREROGATIVE OF THE COURT.

Decrees.

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review: and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree without farther examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made: nevertheless upon new proof, that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.

2. In case of miscasting, being a matter demonstrative, a decree may be explained and reconciled by an order, without a bill of review; not understanding, by miscasting, any pretended misrating or misvaluing, but only error in the auditing or numbering.

3. No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed: as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone.

4. But if any act be decreed to be done which extinguisheth

[1] In some MSS. it is "duly."

the parties' right at the common law, as making of assurance, or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like; those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court.

5. No bill of review shall be put in, except the party that prefers it enter into recognisance with sureties for satisfying of costs and damages for the delay, if it be found against him.

6. No decrees shall be made, upon pretence of equity, against the express provision of an act of parliament: nevertheless if the construction of such act of parliament hath for a time gone one way in general opinion and reputation, and after by a later judgment hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment; because the subject was in no default.

7. Imprisonment for breach of a decree is in nature of an execution; and therefore the custody ought to be strait, and the party not to have any liberty to go abroad, but by special licence of the lord chancellor; but no close imprisonment is to be, but by express order for wilful and extraordinary contempts and disobedience, as hath been used.

8. In case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted *sub pœna* of a sum; and upon affidavit, or other sufficient proof of persisting in contempt, fines are to be pronounced by the lord chancellor in open court, and the same to be estreated down into the hanaper, if cause be, by a special order.

9. In case of a decree made for the possession of land, a writ of execution goes forth; and if that be disobeyed, then process of contempt according to the course of the court against the person, unto a commission of rebellion: and then a serjeant at arms by special warrant: and in case the serjeant at arms cannot find him, or be resisted, or upon the coming in of the party, and his commitment, if he persist in disobedience, an injunction is to be granted for the possession; and in case also that be disobeyed, then a commission to the sheriff to put him into possession.

10. When the party is committed for the breach of a decree, he is not to be enlarged until the decree be fully performed, in all things which are to be done presently. But if there be other parts of the decree to be performed at days or times to

come, then he may be enlarged by order of the court upon recognisance, with sureties to be put in for the performance thereof *de futuro*; otherwise not.

11. Where causes come to a hearing in court, no decree bindeth any person who was not served with process *ad audiendum judicium*, according to the course of the court, or did appear *gratis* in person in court.

12. No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order: but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

Dismissions.

13. Where causes are dismissed upon full hearing, and the dismission signed by the lord chancellor, such causes shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of the bill of review.

14. In case of all other dismissions, which are not upon hearing of the cause, if any new bill be brought, the dismission is to be pleaded; and after reference and report of the contents of both suits, and consideration taken of the former orders and dismission, the court shall rule the retaining or dismissing of the new bill, according to justice and the nature of the case.

15. All suits grounded upon wills nuncupative, leases parol, or upon long leases that tend to the defeating of the king's tenures; or for the establishing of perpetuities; or grounded upon remainders put into the crown, to defeat purchasers; or for brokage or rewards to make marriages; or for bargains at play and wagers; or for bargains for offices contrary to the statute of 5 and 6 Ed. VI.; or for contracts upon usury or simony, are regularly to be dismissed upon motion, if they be the sole effect of the bill, and if there be no special circumstances to move the court to allow their proceedings: and all suits under the value of ten pounds are regularly to be dismissed. *V. postea* § 60.

16. Dismissions are properly to be prayed, and had, either

upon hearing, or upon plea unto the bill, when the cause comes first into court; but dismissions are not to be prayed after the parties have been at charge of examination, except it be upon special cause.

17. If the plaintiff discontinue the prosecution, after all the defendants have answered, above the space of one whole term, the cause is to be dismissed of course without any motion; but after replication put in, no cause is to be dismissed without motion and order of the court.

Election of suits.

18. Double vexation is not to be admitted; but if the party sue for the same cause at the common law and in chancery, he is to have a day given to make his election where he will proceed, and in default of making such election to be dismissed.

Certiorari.

19. Where causes are removed by special *certiorari* upon a bill containing matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestions within fourteen days after the receipt; which if he do not prove, then upon certificate from either of the examiners, presented to the lord chancellor, the cause shall be be dismissed with costs, and a *procedendo* to be granted.

Injunction.

20. No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition.

21. No injunction to stay suits at the common law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only; but upon matter confessed in the defendant's answer, or matter of record, or writing plainly appearing, or when the defendant is in contempt for not answering, or that the debt desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

22. Where the defendant appears not, but sits an attachment; or when he doth appear, and departs without answer, and is under attachment for not answering; or when he takes oath that he cannot answer without sight of evidences in the country; or where after answer he sues at common law by attorney, and absents himself beyond sea; in these cases an injunction is to be granted for the stay of all suits at the common law, until the party answer or appear in person in court and the court

give farther order: but nevertheless upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction in regard of the insufficiency of the answer put in, or in regard of matter confessed in the answer, then the injunction to die and dissolve without any special order.

23. In the case aforesaid, where an injunction is to be awarded for stay of suits at the common law, if the like suit be in the chancery, either by *scire facias*, or privilege, or English bill, then the suit is to be stayed by order of the court, as it is in other courts by injunction; for the court cannot injoin itself.

24. Where an injunction hath been obtained for staying of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself without farther motion.

25. Where a bill comes in after an arrest at the common law for debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defendant's answer, or by sight of writings, plain matter tending to discharge the debt in equity: but if an injunction be awarded and disobeyed, in that case no money shall be brought in or deposited, in regard of the contempt.

26. Injunctions for possession are not to be granted before a decree, but where the possession hath continued by the space of three years, before the bill exhibited, and upon the same title; and not upon any title by lease, or otherwise determined.

27. In case where the defendant sits all the process of contempt, and cannot be found by the serjeant at arms, or resists the serjeant, or makes rescue, a sequestration shall be granted of the land in question; and if the defendant render not himself within the year, then an injunction for the possession.

28. Injunctions against felling of timber, ploughing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case; but not in case where the defendant upon his answer claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

Sequestrations.

29. No sequestration shall be granted but of lands, leases, or goods in question, and not of any other lands or goods not contained in the suits.

30. Where a decree is made for a rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands, being in the defendant's hands, may be granted.

31. Where the decrees of the provincial councils, or of the court of requests, or the queen's court, are by contumacy or other means interrupted; there the court of chancery, upon a bill preferred for corrobations of the same jurisdictions, decrees, and sentences, shall give remedy.

32. Where any cause comes to a hearing, that hath been formerly decreed in any other of the king's courts at Westminster, such decree shall be first read, and then to proceed to the rest of the evidence on both sides.

Suits after judgment.

33. Suits after judgment may be admitted according to the ancient custom of the chancery and the late royal decision of His Majesty, of record, after solemn and great deliberation: but in such suits it is ordered, that bond be put in with good sureties to prove the suggestions of the bill.

34. Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution, or perform other acts, according to the equity of the cause.

Orders, and the office of the Registers.

35. The registers are to be sworn, as hath been lately ordered.

36. If any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, as granted by abuse and surreption; and to that end the registers ought duly to mention the former order in the later.

37. No order shall be explained upon any private petition, but in court as they are made, and the register is to set down the orders as they were pronounced by the court truly, at his peril, without troubling the lord chancellor, by any private attending of him, to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

38. No draught of any order shall be delivered by the register to either party, without keeping a copy by him; to the

end that if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing; and to the end also that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

39. Where a cause hath been debated upon hearing of both parties, and opinion hath been delivered by the court, and nevertheless the cause referred to treaty, the registers are not to omit the opinion of the court, in drawing of the order of reference, except the court doth specially declare that it be entered without any opinion either way; in which case, nevertheless, the registers are out of their short note to draw up some more full remembrance of that that passed in court, to inform the court if the cause come back and cannot be agreed.

40. The registers, upon sending their draught unto the counsel of the parties, are not to respect the interlineations or alterations of the said counsel, be the said counsel never so great, farther than to put them in remembrance of that which was truly delivered in court, and so to conceive the order, upon their oath and duty, without any farther respect.

41. The registers are to be careful in the penning and drawing up of decrees, and specially in matters of difficulty and weight; and therefore when they present the same to the lord chancellor, they ought to give him understanding which are such decrees of weight, that they may be read and reviewed before his lordship sign them.

42. The decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn, within two or three days after every term.

43. Injunctions for possession, or for stay of suits after verdict, are to be presented to his lordship together with the orders whereupon they go forth, that his lordship may take consideration of the order before he sign them.

44. Where any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particular reasons and grounds moving the court to vary from the general use.

References.

45. No reference upon a demurrer, or question touching the jurisdiction of the court, shall be made to the masters of the

chancery; but such demurrers shall be heard and ruled in court, or by the lord chancellor himself.

46. No order shall be made for the confirming or ratifying of any report without day first given, by the space of a sevennight at the least, to speak to it in court.

47. No reference shall be made to any master of the court, or any other commissioners, to hear and determine, where the cause is gone so far as to examination of witnesses, except it be in special causes of parties near in blood, or of extreme poverty, or by consent: and general reference of the state of the cause, except it be by consent of the parties, to be sparingly granted.

48. No report shall be respected in court, which exceedeth the warrant of the order of reference.

49. The masters of the court are required not to certify the state of any cause as if they would make breviate of the evidence on both sides, which doth little ease the court, but with some opinion; or otherwise, in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing, without respect had to the same.

50. Matters of account, unless it be very weighty causes, are not fit for the court, but to be prepared by reference; with this difference nevertheless, that the cause come first to a hearing, and upon the entrance into a hearing they may receive some direction, and be turned over to have the accounts considered; except both parties, before hearing, do consent to a reference of the examination of the accounts, to make it more ready for a hearing.

51. The like course to be taken for the examination of court rolls, upon customs and copies; which shall not be referred to any one master, but to two masters at the least.

52. No reference to be made of the insufficiency of an answer, without showing of some particular point of the defect; and not upon surmise of the insufficiency in general.

53. Where a trust is confessed by the defendant's answer, there needeth no farther hearing of the cause, but a reference presently to be made upon the account, and so to go on to a hearing of the accounts.

Suits in court.

54. In all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*,

he shall pay unto the defendant his utmost costs, to be assessed by the court.

Bills, demurrers, answers, pleadings, and copies.

55. If any bill, answer, replication, or rejoinder, shall be found of an immoderate length, both the party and the counsel under whose hand it passeth shall be fined.

56. If there be contained in any bill, answer, or other pleading, or any interrogatory, any matter libellous or slanderous against any that is not party to the suit, or against such as are parties to the suit upon matters impertinent, or in derogation of the settled authority of any of His Majesty's courts; such bills, answers, pleadings, or interrogatories, shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit, for the abuse of the court: and the counsellors at law, who have set their hands, shall likewise receive reproof or punishment, if cause be.

57. Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need farther attendance or no.

58. A demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like: and such plea may be put in without oath in case where the matter of the plea appears upon record; but if it be any thing that doth not appear upon record, the plea must be upon oath.

59. No plea of outlawry shall be allowed without pleading the record *sub pede sigilli;* nor plea of excommunication, without the seal of the ordinary.

60. Where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed according to the fifteenth ordinance, such matter is to be set forth by way of demurrer.

61. Where an answer shall be certified insufficient, the defendant is to pay costs: and if a second answer be returned insufficient, in the points before certified insufficient, then double costs, and upon the third treble costs, and upon the fourth quadruple costs, and then to be committed also until he

hath made a perfect answer, and to be examined upon interrogatories touching the points defective in his answer; but if any answer be certified sufficient, the plaintiff is to pay costs.

62. No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

63. An answer to a matter charged as the defendant's own fact must be direct, without saying it is to his remembrance, or as he believeth, if it be laid to be done within seven years before: and if the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as if a fact be laid to be done with divers circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance; so if he be charged with the receipt of one hundred pounds, he must traverse that he hath not received a hundred pounds, or any part thereof; and if he have received part, he must set forth what part.

64. If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points; and a decree ought not to be made, but upon hearing the answer read in court.

65. Where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

66. No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

67. All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which only subscription no fee at all shall be taken.

Commissions, examinations, and depositions.

68. All commissions for examination of witnesses shall be *super interr. inclusis* only, and no return of depositions into the court shall be received, but such only as shall be either comprised in one roll subscribed with the names of the commissioners, or else in divers rolls whereof each one shall be so subscribed.

69. If both parties join in commission, and upon warning given the defendant bring his commissioners, but produce no witness, nor minister interrogatories, but after seek a new

commission, the same shall not be granted: but nevertheless upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff or his attorney notice, that he may examine also if he will.

70. The defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud or practice pregnantly appearing to the court, or otherwise upon offer of the plaintiff to be concluded by the answer of the defendant without any liberty to disprove such answer, or to impeach him after of perjury.

71. Decrees in other courts may be read upon hearing without the warrant of any special order: but no depositions taken in any other court are to be read but by special order; and regularly the court granteth no order for reading of depositions, except it be between the same parties, and upon the same title and cause of suit.

72. No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

73. Witnesses shall not be examined *in perpetuam rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses; with this restraint nevertheless, that no benefit shall be taken of the depositions of such witnesses in case they may be brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

74. No witnesses shall be examined after publication, except it be by consent, or by special order, *ad informandam conscientiam judicis*, and then to be brought close sealed up to the court to peruse or publish, as the court shall think good. *Ad informandam conscientiam judicis.*

75. No affidavit shall be taken or admitted by any master of the chancery tending to the proof or disproof of the title or matter in question, or touching the merits of the cause; neither shall any such matter be colourably inserted in any affidavit for serving of process. Affidavits.

76. No affidavit shall be taken against affidavit, as far as the masters of the chancery can have knowledge; and if any such be taken, the latter affidavit shall not be used nor read in court.

77. In case of contempts grounded upon force or ill words upon serving of process, or upon words of scandal of the court, proved by affidavit, the party is forthwith to stand committed; but for other contempts against the orders or decrees of the court, an attachment goes forth, first, upon an affidavit made, and then the party is to be examined upon interrogatories, and his examination referred; and if upon his examination he confess matter of contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt: and thereupon[1] if the contempt appear, the party is to be committed; but if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

78. They that are in contempt, specially so far as proclamation of rebellion, are not to be heard, neither in that suit, nor any other, except the court of special grace suspend the contempt.

79. Imprisonment upon contempt for matters past may be discharged of grace, after sufficient punishment, or otherwise dispensed with: but if the imprisonment be for not performance of any order of the court in force, they ought not to be discharged except they first obey, but the contempt may be suspended for a time.

Petitions.

80. Injunctions, sequestrations, dismissions, retainers upon dismissions, or final orders, are not to be granted upon petitions.

81. No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

82. No commission for examination of witnesses shall be discharged, nor no examinations or depositions shall be suppressed upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

[1] I have substituted this for "therefore."

83. No demurrer shall be overruled upon petition.

84. No *scire facias* shall be awarded upon recognisances not enrolled, nor upon recognisances enrolled, unless it be upon examination of the record with the writ; nor no recognisance shall be enrolled after the year, except it be upon special order from the lord chancellor.

85. No writ of *ne exeat regnum*, prohibition, consultation, statute of Northampton, *certiorari* special, or *procedendo* special, or *certiorari* or *procedendo* general more than one in the same cause, *habeas corpus*, or *corpus cum causa*, *vi laica removend'*, or restitution thereupon, *de coronatore et viridario eligendo* in case of amoving, *de homine replegiando*, assize on[1] special patent, *de ballivo amovend'*, *certiorari super præsentationibus fact. coram commissariis sewar'*, or *ad quod dampnum*, shall pass without warrant under the lord chancellor's hand, and signed by him, save such writs *ad quod dampnum* as shall be signed by master attorney.

86. Writs of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege: and as for the number, it shall be set down by schedule: for the case, it is to be understood that besides persons privileged as attendants upon the court, suitors and witnesses are only to have privilege *eundo*, *redeundo*, *et morando*, for their necessary attendance, and not otherwise; and that such writ of privilege dischargeth only an arrest upon the first process; but yet, where at such times of necessary attendance the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

87. No *supplicavit* for the good behaviour shall be granted, but upon articles grounded upon the oath of two at the least, or certificate of any one justice of assize, or two justices of the peace, with affidavit that it is their hands, or by order of the star-chamber, or chancery, or other of the king's courts.

88. No recognisance of the good behaviour, or the peace, taken in the country, and certified into the petty-bag, shall be filed in the year without warrant from the lord chancellor.

89. Writs of *ne exeat regnum* are properly to be granted according to the suggestion of the writ, in respect of attempts

[1] I have substituted "on" for "or." The thing meant seems to be a special patent to justices not being justices of assize for the county. See Fitz. N.B. 177. J. K.

prejudicial to the king and state, in which case the lord chancellor will grant them upon prayer of any the principal secretaries without cause shewing, or upon such information as his lordship shall think of weight: but otherwise also they may be granted, according to the practice of long time used, in case of interlopers in trade, great bankrupts in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects, also in case of duels, and divers others.

90. All writs, certificates, and whatsoever other process returnable *coram Rege in Canc.* shall be brought into the chapel of the rolls, within convenient time after the return thereof, and shall be there filed upon their proper files and bundles as they ought to be; except the depositions of witnesses, which may remain with any of the six clerks by the space of one year next after the cause shall be determined by decree or otherwise be dismissed.

91. All injunctions shall be enrolled, or the transcript filed; to the end that if occasion be, the court may take order to award writs of *scire facias* thereupon, as in ancient time hath been used.

92. All days given by the court to sheriffs to return their writs, or bring in their prisoners upon writs of privilege, or otherwise between party and party, shall be filed, either in the register's office, or in the petty-bag respectively; and all recognisances taken to the king's use, or unto the court, shall be duly inrolled in convenient time with the clerks of the inrollment, and calendars made of them, and the calendars every Michaelmas term to be presented to the lord chancellor.

93. In case of suits upon the commission for charitable uses, to avoid charge, there shall need no bill, but only exceptions to the decree, and answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the lord chancellor by the clerk of the petty-bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

94. Upon suit for the commission of sewers, the names of those that are desired to be commissioners are to be presented to the lord chancellor in writing; then his lordship will send the names of some privy counsellor, lieutenant of the shire, or justices of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not

put in for private respects; and upon the return of such opinion, his lordship will give farther order for the commission to pass.

95. No new commission of sewers shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great and weighty ground.

96. No commission of bankrupt shall be granted but upon petition first exhibited to the lord chancellor, together with names presented, of which his lordship will take consideration, and always mingle some learned in the law with the rest; yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into, in 200*l.* at least, to prove him a bankrupt.

97. No commission of delegates in any cause of weight shall be awarded, but upon petition preferred to the lord chancellor, who will name the commissioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whence the appeal is.

98. Any man shall be admitted to defend *in forma pauperis* upon oath; but for plaintiffs, they are ordinarily to be referred to the court of requests, or to the provincial councils, if the case arise in those jurisdictions, or to some gentlemen in the country, except it be in some special cases of commiseration, or potency of the adverse party.

99. Licences to collect for losses by fire or water are not to be granted, but upon good certificate; and not for decays by suretyship or debt, or any other casualties whatsoever; and they are rarely to be renewed; and they are to be directed ever unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require; and if it were by sea, then unto the county where the port is from whence the ship went, and to some sea-counties adjoining.

100. No exemplifications shall be made of letters patents, *inter alia*, with omission of the general words; nor of records made void or cancelled; nor of the decrees of this court not inrolled; nor of depositions by parcel and fractions, omitting the residue of the depositions; nor of depositions in court, to which the hand of the examiner is not subscribed; nor of

records of the court not being inrolled or filed; nor of records of any other court, before the same be duly certified to this court, and orderly filed here; nor of any records upon the sight and examination of any copy in paper, but upon sight and examination of the original.

101. And because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added; therefore his lordship intendeth in any such case from time to time to publish any such revocations or additions.

APPENDIX.

In 1641 there was published a small volume in 21 chapters, with the title *Cases of Treason, written by Sir Francis Bacon, H.M.'s Solicitor-General.* The same matter, with very slight variation and with differing titles, is to be found in Harl. MSS. No. 6797, Sloane MSS. No. 4263, and Lansd. MSS. No. 612, all of them assigning 1608 as the date of the composition.

The first part of the collection is in substance the same as the *Preparation for the Union of Laws*, omitting the preface; the main difference being the compression here and there of several clauses in the *Preparation* into one:—for instance, comprising in the first paragraph the death of the king, the king's wife, and the king's eldest son; or, as another copy has it more concisely, the king, his wife, or eldest son. If the collection had been in existence (whether Bacon's or another's) before it was used for the special purpose of the Union, the separation of such a paragraph into its elements would be natural for the purpose of collation with Scotch law.

The five paragraphs forming the first fragment in this appendix immediately follow the *Cases of Heresy.* They may well (if genuine) have been intended for insertion in the third part of the *Preparation.*

Some copies incorporate with this text what others make part of a synopsis — comprehending what has already been printed at p. 754., and other matter quite beside any of the subjects of this collection. As I think this must be the true origin of the paragraphs in question, I have printed them in this form.

The *Answers to the Questions of Sir A. Hay*, follow: and then the other matter lastly here printed.

On this last portion Archbishop Sancroft notes, "Written, some say, by Sir John Doderidge." On referring to Doderidge's *History of the Principality of Wales* (which, though the earliest printed edition in the Brit. Mus. is of 1631, appears to have been written when Lord Buckhurst was Treasurer, and Lord

Zouch President of the Welsh Council, and was therefore probably accessible to Bacon and others in 1608), I find that the greater part of the matter is to be found there with such differences as to make it specially applicable to Wales. Bacon, or whoever the compiler may be, must have thought it a handy summary, and so have adopted and adapted it. I think it probable the greater part of the collection might in like manner be traced to other hands, Lambard, &c., if it were worth while to make the search.

CASES OF THE KING'S PREROGATIVE.

The king's prerogative in parliament.

1. THE king hath an absolute negative voice to all bills that pass the parliament, so as without his royal assent they have a mere nullity, and not so much as *authoritas præscripta*, as *senatus consulta* had notwithstanding the intercession of tribunes.

2. The king may summon parliaments, dissolve them, adjourn and prorogue them at his pleasure.

3. The king may add voices in parliament at his pleasure, for he may give privileges to borough towns, and call and create barons at his pleasure.

4. No man can sit in parliament unless he take the oath of allegiance.

The king's prerogative in war and peace.

1. The king hath power to declare and proclaim war, and make and conclude peace.

2. The king hath power to make leagues and confederacies with foreign estates, more or less strait, and to revoke and disannul them at his pleasure.

3. The king hath power to command the bodies of his subjects for service of his wars, and to muster, train, and levy men, and to transport them by sea or land at his pleasure.

4. The king hath power in time of war to execute martial law, and to appoint all officers of war at his pleasure.

5. The king hath power to grant his letters of mart and reprisal for remedy to his subjects upon foreign wrongs.

6. The king may give knighthood, and thereby enable any subject to perform knight's service.

The king's prerogative in matter of money.

1. The king may alter his standard in baseness or fineness.
2. The king may alter his stamp in the form of it.
3. The king may at his pleasure alter the valuations, and raise and fall moneys.
4. The king may by proclamation make money of his own current or not.
5. The king may take or refuse the subjects' bullion or coin for more or less money.
6. The king by proclamation may make foreign money current, or not.

The king's prerogative in matters of trade and traffic.

1. The king may constrain the person of any of his subjects not to go out of the realm.
2. The king may restrain any of his subjects to go out of the realm in any special part foreign.
3. The king may forbid the exportation of any commodities out of the realm.
4. The king may forbid the importation of any commodities into the realm.
5. The king may set a reasonable impost upon any foreign wares that come into the realm, and so of native wares that go out of the realm.

The king's prerogative in the persons of his subjects.

1. The king may create any corporation or body politic, and enable them to purchase, to grant, to sue, and be sued; and with such restrictions and limitations as he pleases.
2. The king may denizen and enable any foreigner for him and his descendants after the charter; though he cannot naturalize, nor enable him to make pedigree from ancestors paramount.
3. The king may enable any attainted person by his charter of pardon, and purge the blood for time to come, though he cannot restore the blood for the time past.
4. The king may enable any dead persons in the law, as

men professed in religion, to take and purchase to the king's benefit.

A twofold power of the law
- 1. Direction — In this respect the king is underneath the law, because his acts are guided thereby.
- 2. Correction — In this respect the king is above the law, for it may not correct him for any offence.

A twofold power in the king
1. His absolute power, whereby he may levy forces against any nation.
2. His limited power, which is declared and expressed in the laws, what he may do.

Of the jurisdiction of Justices itinerant in the principality of Wales.

1. They have power to hear and determine all criminal causes, which are called, in the laws of England, pleas of the crown; and herein they have the same jurisdiction that the justices have in the court of the king's bench.

2. They have power to hear and determine all civil causes, which in the laws of England are called common pleas, and to take knowledge of all fines levied of lands or hereditaments, without suing any *dedimus potestatem;* and herein they have the same jurisdiction that the justices of the common pleas do execute at Westminster.

3. They have power also to hear and determine all assizes upon disseisin of lands or hereditaments, wherein they equal the jurisdiction of the justices of assize.

4. Justices of *oyer* and *terminer* therein may hear all notable violences and outrages perpetrated within their several precincts in the said principality of Wales.

These offices are in the king's gift.

The prothonotary's office is to draw all pleadings, and to enter and ingross all records and judgments in civil causes.

The clerk of the crown his office is to draw and ingross all proceedings, arraignments, and judgments in criminal causes.

These offices are in the judges' disposition.

The marshal's office is to attend the persons of the judges at their coming, sitting, and going from their sessions or court.

The crier is *tanquam publicus præco,* to call for such persons whose appearances are necessary, and to impose silence to the people.

The office of justice of peace.

There is a commission under the great seal of England to certain gentlemen, giving them power to preserve the peace, and to resist and punish all turbulent persons, whose misdemeanors may tend to the disquiet of the people; and these be called justices of the peace, and every of them may well and truly be called *Eirenarcha.*

The chief of them is called *Custos rotulorum,* in whose custody all the records of their proceedings are resident.

Others there are of that number called justices of peace and *quorum,* because in their commission they have power to sit and determine causes concerning breach of peace and misbehaviour; the words of their commission are conceived thus, *Quorum,* such and such, *unum vel duos, etc. esse volumus;* and without some one or more of the *quorum,* no sessions can be holden; and for the avoiding of a superfluous number of such justices, (for through the ambition of many it is counted a credit to be burthened with that authority,) the statute of 38 H. VIII. hath expressly prohibited that there shall be but eight justices of the peace in every county. These justices hold their sessions quarterly.

Justices of peace appointed by the lord keeper.

In every shire where the commission of the peace is established, there is a clerk of the peace for the entering and ingrossing of all proceedings before the said justices. And this officer is appointed by the *custos rotulorum.*

The office of sheriffs.

Every shire hath a sheriff, which word, being of the Saxon English, is as much as to say shire-reeve, or minister of the county: his function or office is two-fold, namely,

1. Ministerial.
2. Judicial.

1. He is the minister and executioner of all the process and precepts of the courts of law, and therefore ought to make return and certificate.

2. The sheriff hath authority to hold two several courts of distinct natures: 1. The *turn,* because he keepeth his turn and circuit about the shire, and holdeth the same court in several places, wherein he doth inquire of all offences perpetrated against the common law, and not forbidden by any statute or act of

parliament; and the jurisdiction of this court is derived from justice distributive, and is for criminal offences, and held twice every year.

2. The *County Court*, wherein he doth determine all petty and small causes civil under the value of forty shillings, arising from the said county; and therefore it is called the county court.

The jurisdiction of this court is derived from justice commutative, and is held every month. The office of the sheriff is annual, and in the king's gift, whereof he is to have a patent.

The office of escheator.

Every shire hath an officer called an escheator, which is an office to attend the king's revenue and to seize into his majesty's hands all lands escheated, and goods or lands forfeited, and therefore is called escheator; and he is to inquire by good inquest of the death of the king's tenant, and to whom the lands are descended, and to seize their bodies and lands for ward if they be within age, and is accountable for the same: he is named by the lord treasurer of England.

The office of coroner.

Two other officers there are in every county called coroners; and by their office they are to enquire by good inquest in what manner, and by whom every person dying of a violent death came so to their death; and to enter the same of record; which is matter criminal, and a plea of the crown: and therefore they are called coroners, or crowners, as one hath written, because their inquiry ought to be *in corona populi.*

These officers are chosen by the freeholders of the shire, by virtue of a writ out of the chancery *de coronatore eligendo:* and of them I need not to write more, because these officers are in use elsewhere.

General observations touching constables, gaolers, and bailiffs.

Forasmuch as every shire is divided into hundreds, there are also by the statute of 34 H. VIII. cap. 26. ordered and appointed, that two sufficient gentlemen or yeomen shall be appointed constables of every hundred.

Also there is in every shire a gaol or prison appointed for the restraint of liberty of such persons as for their offences are thereunto committed, until they shall be delivered by course of law.

In every hundred of every shire the sheriff thereof shall nominate sufficient persons to be bailiffs of that hundred, and under-ministers of the sheriffs: and they are to attend upon the justices in every of their courts and sessions.

NOTE.

Pages 325 and 369. The origin of the bad grammar in Reg. 19, which I only observed while correcting the press, is to be found at the end of the second paragraph of p. 407, where we have *iisdem modis quibus, &c.*

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